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T H E

Compleat Sheriff:

Wherein is set forth,
His *OFFICE* and *AUTHORITY*;

W I T H

OCT 9

Directions, how and in what Manner to execute the same, according to the Common and Statute Laws of this Kingdom, which are now in Force and Use: And the Judgments and Resolutions of the Judges in divers late Cases in the several Courts of *Westminster*, relating thereunto.

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Rec. Nov. 28, 1877

THE PREFACE.

WHEN Sir *Edward Coke*, in his first *Institutes*, fol. 168. tells us, that the Sheriff hath *Triplicem Custodiam*: (1.) *Vita Justitiæ*, (2.) *Vita Legis*, (3.) *Vita Reipublicæ*; he thereby gives us a short, but pithy Description of this Important Office. And if *Execution* be the Life of the Law, as without Doubt it is) it seems to be seated in the Sheriff, as in the Heart, which is *primum vivens*, and *ultimum moriens*. Original Process moves and is directed to him; Subsequent Proceedings are circulated in him, and at last are finished and compleated by him.

This gives us to understand, not only the Importance, but the Extensiveness of the Sheriff's Office. Especially when we consider how many Thousands of Families

A 3

lies

The P R E F A C E.

lies have suffered irreparable Ruin by the Ignorance or Carelesness (not to say worse) of *Sheriffs* and their Officers; nay, they themselves failing in the due Discharge of their Duty, have oftentimes rendred themselves *Obnoxious* to chargeable Payments and difficult Defences.

Certainly then, to understand well the Law about *Sheriffs*, and their fit Management and Demeanour in all the Branches and Circumstances relating to their Office, is a Thing of as great Consideration as any that can be propounded to us, as Members of a Body Politick.

We have indeed many that have treated of some Parts thereof, (*inter alia*) as *Crompton*, *Kitchin*, *Greenwood*, &c. But I know but Two that have designedly undertaken this Title.

Mr. *Dalton* (a Person of great Learning and Industry) has discovered much Reading in our Old Books, and is also of very great Use to direct us in CASES that may seldom and rarely happen; and yet there is much of him now antiquated, and
diverted

The P R E F A C E.

diverted into other Channels. The receiving *Fee-Farm Rents, Waifs, Estrays, Deodands, Wards, Bona Felonum, &c.* seldom or never troubling the *Sheriff*, having been extinct or aliened by Act of Parliament, or granted to Lords of Manors, or other Persons,

Besides, some Things are there delivered for Law, and so might pass in his Time, which have received quite contrary Resolutions; and Thousands of Cases have happened since, which are not to be found in him, nor in the least mentioned by him. Neither has he been so happy as we could wish, to treat methodically of *Rescousers, Escapes, &c.* which make a great Figure in our Books; and he has totally omitted (unless it be *Sparsim*) the proper Remedies against the *Non-Feasance, or Male-Feasance* of the *Sheriffs* and their Officers. I have, in many Titles, referred you to him, but they are such as are common, and known of Course, or else seldom or never practicable.

The P R E F A C E.

Mr. *Wilkinson* is (for so much as he hath undertaken) neatly and judiciously done: But as to the Office of *SHERIFFS*, though the Book bears that Title, yet it is the least Part thereof, not exceeding above Four printed Sheets; so that we cannot think that sufficient Direction to us. Nor have either of them given any Directions as to the Laying of *Actions, Declarations, Pleadings, and Trials or Evidence*; and therefore I have been the more careful to place them under their proper Titles.

Upon these Reflections, it seems not unreasonable to imagine, that a Treatise of this Nature may find some Acceptance, and meet with a favourable Reception, as well from Gentlemen (who are, or may be capable for this weighty Office, and thereby be better enabled to serve their King and Country, and also themselves) as from the *Students and Practisers* of our Common Law.

THE

THE CONTENTS.

CHAP. I.

OF Counties. *When the Realm was divided into Counties; a List of the Counties in England and Wales, and of Cities and Towns having Sheriffs. Vicecomit. Notatio nominis. Sheriffs, eligible in former Times, how at this Day. The Sheriff's Honour, Power and Privilege. His Office not apportionable. What he may do as Conservator Pacis. How favoured in the Execution of his Office. Of his Assistance. In what Things and Cases he is restrained. Not to let his County or Hundred to Farm, &c.*
Page I

CHAP. II.

What the Sheriff must do at the Entrance into his Office. The Form of the Writ of Discharge of the Old Sheriff. The Form of his Oath: How and before whom he is to be sworn, and
a the

The Contents.

the Return. Of Delivery of Writs and Prisoners by the Old Sheriff to the New. Till what Time the Old Sheriff or his Officers may act. What is to be done in Case of the King's Death. What shall be said a good Delivery of Prisoners, and how to be made. The Form of the Indenture of setting over the Prisoners and the Writs. The Form of the Return of those that have been executed by the Old Sheriff. What Acts the Old Sheriff may or must do after his Discharge, and what Remedy against him for a Misdemeanour in his Office. When and where the New Sheriff must read his Patent, and make his Deputies in the County and Courts above. How and in what Cases his Office is determined before his Year be out. Page 16

C H A P. III.

*Of Under-Sheriff, &c. His Nature, Office and Oath. In what Cases the High-Sheriff might execute the Office in Person. He cannot abridge the Under-Sheriff's Power. Of the Sheriff's Deputy in the County and Courts above. Pleading by the Deputy. Of Rescue from him. What Bonds or Covenants between the High-Sheriff, and the Under-Sheriff, Bailiff, Gaolers, the High-Sheriff shall be answerable for, or not; and what Action shall be brought against the High-Sheriff, Under-Sheriff or Gaolers. Cases and Resolutions about the Rule Respondeat Superior. Where
and*

The Contents.

*and in what Cases the Lord of a Franchise
shall be answerable. Of Trials by the She-
riff or Sheriffs Certificate, or by the Record.*

Page 32

C H A P. IV.

*Of Bailiffs of Hundreds, their Nature, Of-
fice and Oath. Of Common and Special Bail-
iffs, and of Promises on making of Special
Bailiffs to save harmless from Escapes. Of
Bailiffs of Franchises, their Nature, Power,
Office; and of Returns by them. The Man-
ner of Pleading by Bailiff of Franchises.
In what Cases the Sheriff may enter into the
Liberty of Bailiffs of Fees or Guildable. 50*

C H A P. V.

*Of the County-Court. The Nature of it. Its
Jurisdiction as to the Sum it holds Plea of.
Of the Time and Place. The Forms of the
Original Process. Of Execution there. Of
the County-Clerk. Adjournment of Court. Of
Replevin. The Sheriff's Office and Demean-
our therein, and the Returns, and what are
good or not. Pone. Withernam, the Man-
ner of Replevyng. The Retorno habendo.
Second Deliverance. Property. Recordare.
Pledges in Replevin. The Form of the Entry
of the Plaint. The Form of the Precept in
Replevin. The Form of the Bond for Se-
curity. Of Accedas ad Curiam. Record.
fac. loquelam. Of the Writ of Justicies.*

The Contents.

Of the Sheriff's Tourns, Jurisdiction and Pleadings.

Page 63

C H A P. VI.

Of the Original Process in Real Actions, and in Personal Actions, with the Returns, as Summons, Attachment, &c. of Mean Process. What Arrest by the Sheriff or Bailiff shall be good or not. Of the Bailiff's shewing his Warrant, as to the Time of the Arrest before or after the Return, in respect of the Persons arrested. Of Non omittas. Who are privileged or protected from Arrests, or not, in regard of Persons, Courts, Debts, &c. and the Stat. 7 Annæ and 12 Georgii restraining Arrests. Where Arrests shall be lawful or not, in respect of the Warrant. Of Warrants to Special Bailiffs, and to known or common Bailiffs. Of Pledges de Prosequendo.

87

C H A P. VII.

Of Bail. Of Special Bail. Who shall take Bail or not. Of Bail-Bonds. Explication of the Statute of 23 H. 6. c. 10. The Design of the Statute. The Form to be observed according to the Statute. What Obligations and Conditions are within this Statute, or not. In respect of the Persons and Officers to whom they are made; in respect of the Form, of the Courts, and of the Sureties. The Meaning of the Words Colore Officii. Of the Statute

I

23 H.

The Contents.

23 H. 6. being pleaded, and when and how to be pleaded. What Appearance to a Sheriff's Bond is good, or not. Of the Sheriff's Return on taking Bail. Of insufficient Bail. Of refusing sufficient Bail, and the Remedy against the Sheriff for so doing. The Sheriff's pleading this Statute in Actions brought against him. Of Bail-Bonds being discharged or assigned. Of other Bonds besides Bail-Bonds entred into to the Sheriff, as for being a true Prisoner, saving harmless from Escapes. For Fees, &c. and the Pleadings thereto, with all the late Cases and Resolutions relating thereunto. In what other Cases the Sheriff may bail, or not. Page 108

C H A P. VIII.

Of the Return of Writs: When they may be returned. General Rules and Maxims of Returns. What Writs must be returned, and what need not. What shall be a good Return of Writs, or how Returns shall be made, in respect of the Person that makes the Return, as Sheriffs, Bailiffs of Franchises, &c. in respect of the Forms, and where insufficient Returns are aided. Where Returns shall be void, for the Uncertainty or Repugnancy. What shall be a good Return against the Admittance of the Party, or not. What shall be a sufficient Excuse for the Sheriff's Non Return of a Writ, and what not. What Aids, Process or Appearance shall be good before the Return. The Penalty on the Sheriff by the Court for Non-Returns.

The Contents.

turns. *Where Sheriffs Returns shall be amended, and where not.* Page 144

C H A P. IX.

Remedy against the Sheriff for a false Return. Where, and in what Cases, and what Action lies against him for a false Return. Where such Actions are to be brought, how to be laid, and the Manner of declaring therein. Of the Reason of the Return of Cepi Corpus upon Bail taken. Where Action lies against the Sheriff or Bailiff of a Franchise, and which of them upon a false Return. Remedy against the Sheriff for not returning the Writ, or against his Bailiff, or against the Bailiff of a Franchise. Of laying the Action, and declaring thereupon. Where and in what Cases a Man may traverse the Sheriff's Return, or not. 164

C H A P. X.

Of Venire Facias, Habeas Corpora Jurat', and Distringas. What Returns shall be good on a Venire, &c. or not. Of Amendments of Venires, &c. Of Tales. 181

C H A P. XI.

Of Habeas Corpus: The several Sorts, and the Consequence thereof. Of the Returns of Habeas Corpus by the Sheriff, &c. and in respect of the Courts commanding Rules on Habeas

The Contents.

Habeas Corpus. *Who to pay the Charges:*
The Forms of the Returns. Returns of Cer-
tiorari. Page 193

C H A P. XII.

How many Sorts of Juries. Of Returns, and by whom returned. What Manner of Persons shall not be returned on Juries, and how such Persons shall be discharged; where, when, and how Persons exempt shall have Action against the Sheriff for impanelling them. Of returning trop petit Issues. Of levying the Issues. Of other erroneous Proceedings and Misdemeanors of Sheriffs about and concerning Jurors. What Estate every Juror must have by the late Statute of 4 & 5 of William and Mary. Of Challenges, and the several Sorts and Causes of Challenge, and what are good or not, and when to be taken.

199

C H A P. XIII.

Of the Writ of Enquiry of Damages, and the Sheriff's Demeanour therein; and in what Cases a new Writ shall be granted, or not. By whom to be executed. The Time of executing it. The Form of the Return of a Writ of Enquiry of Damages.

212

The Contents.

C H A P. XIV.

Where and in what Cases the Sheriff's Return of a Devastavit shall be good, or not. When such Return to be made. How the Party may discharge himself of a Devastavit by Plea, and the late Practice, and not by Inquisition.

Page 214

C H A P. XV.

Of Prisons: To whom they belong, and the Place where to be kept. Who may be Keepers of Gaols, &c. and how forfeitable. Of the Sheriffs of London's Prison, and of the Marshalsea, and the Grant thereof. Of the Sheriff's Demeanour towards the Prisoners. Of Prisoners Misbehaviour. What Payment of a Debt to a Gaoler shall be good, or not. And of those that break Prison.

220

C H A P. XVI.

Of Executions. When one may be said to be in Execution, or not. To what Sheriff, and of what Place or County shall Execution be awarded. Of a Capias ad satisfaciendum; for what, and against whom it lies, and the Sheriff's Demeanour thereupon.

227

C H A P.

The Contents.

C H A P. XVII.

Of Fieri facias,

What Goods, &c. and of whom, shall be taken in Execution by Fieri fac', or not. After the Sheriff has seised the Goods, how he stands in the Eye of the Law, either to bring Actions for the tortious Taking them away from him, or to make Satisfaction to the Party who recovered. What Remedy against the Sheriff for the Money, to the Value of the Goods taken in Execution, or not; and how to be pursued. The Sheriffs Office and De-meanour in Executing a Fieri facias. Of the Sheriffs selling Goods on the Fieri fac', and of the Venditioni exponas, and the Return. What shall be a good Return of the Sheriff on a Fieri facias, or not. Of Restitution to Lands or Goods, seised by the Sheriff after Reversal of the Judgment, and after Sale. Of the Sheriff's selling a Term for Years taken in Execution, and when such Sale shall be good, or not. Difference between the Extent of a Term on Elegit, and Sale by Fieri facias. Whether a Fieri facias on a Judgment in the King's Bench shall go into Wales.

Page 241

C H A P.

The Contents.

C H A P. XVIII.

How the Sheriff is to demean himself in giving Possession and Seisin upon the Writs of Habere fac' possession', or Seisinam. As to the Manner of Doing, and the Return of a Superfedeas. Where it shall stay the Sale of Lands or Goods, or not. What amounts to a Superfedeas. Where and when a Writ of Error is a Superfedeas. Of Audita Querela.
Page 262

C H A P. XIX

Of Elegits, &c.

The Sheriffs Office therein. The Difference of it as to Lands and Goods; how to be managed by the Sheriff that it may be well Executed, and what Things may be Executed, or not. Of the Inquisition. Returns of Elegit, how to be made. Where a New Elegit shall be had. Of Extent by the Bailiff of a Liberty. The Sheriffs Office about Execution for the King's Debt. Of Statute-Merchant, Staple, Recognisance, Liberate. The Differences of the Returns. Returns of Scire fac. The Sheriffs Demeanour as to Outlawries and Capias Utlagatum; and the Returns. 274

C H A P.

The Contents.

C H A P. XX.

Of Rescous.

Where and in what Cases Action lies against a Sheriff for a Rescous; and what Action. Diversity between Mean Process and Execution. Where the Sheriff makes himself chargeable by his Return. Where, and what Remedy against the Rescousor by Action or Indictment. Of Returns of Rescous, what is good, or not. Of Laying the Action, and how to Declare. Of Rescous, and Pleadings in it. The Venue in this Action for a Rescue.

Page 302

C H A P. XXI.

Of Escapes.

Some Maxims and Diversities premised. Escapes as to Mean Process and Execution. What shall be or amount to an Escape of a Prisoner out of Execution, or not. Of Escapes in respect of the Old and New Sheriffs, and of the Prisoners being delivered over. What Thing or Act shall excuse an Escape; or in what Cases the Sheriff or Gaoler shall not be Answerable for an Escape; and of Erroneous Process excusing, and how far, and in what Cases. Where the Escape of one shall not be a Discharge of the other; and where the other shall have Audita Querela,

or

The Contents.

or not. Of Actions of Debt, or on the Case, by the Party against the Sheriff for an Escape. Who shall have such Action, and to whom it shall be said an Escape, or not, at Election.

Page 323

C H A P. XXII.

Action for Escape by Executors and Administrators, where it lies, or not. Against whom Action of Escape lies. Where Execution shall be after Execution on Escape, or not; and where it shall not be a Discharge of Execution, but that he may be retaken again. Of laying the Action, and Manner of Declaration in this Action: Where the Sheriff shall have this Action against the Prisoner that escapes, and how to declare against him. 352

C H A P. XXIII.

*Of Pleadings by the Sheriff to Actions for Escape. What shall be said a sufficient Fresh Pursuit, and where upon Fresh Pursuit he may retake the Prisoner, or not; and where the Prisoner, upon his being retaken, shall have his Audita Querela, or not. Fresh Pursuit, how to be pleaded. Pleading the Statute of Limitations. Pleading Acknowledgment of Satisfaction on Record by the Plaintiff, or Accord with Satisfaction. Nul tiel Record Pleaded, and how. Escape by Consent of the Plaintiff, and by the Sheriff's Licence. Traverse in the Pleading. Su-
perse-*

The Contents.

persedeas, Protection, Privilege pleaded. Bar by voluntary Escape. Venue, Issue, Evidence, Special Verdict in Actions for Escapes. Of the Escape of Felons. Page 374

C H A P. XXIV.

What Act of the Sheriffs, Bailiffs, &c. shall amount to False Imprisonment, or not. Pleading by Sheriffs to Actions of Trespass, False Imprisonment, &c. The Rules of Pleading in such Cases. Justification by mean Process, as to the Warrant, Time, Place. Quæ est eadem Transgressio, what it refers to. Traverse of the Time, Place, Pleadings and Justification by Execution: By Process out of an Inferior Court of Record, and how to be Pleaded.

394

C H A P. XXV.

Of Attachments against the Sheriff, where and in what Cases it lies, or not: And where against him for a Thing done out of his Office. Attachment of Money in the Sheriffs Hands. Of Attachment against others, and against the Goods, and the Return. Of Amerciaments. Where, and in what Cases the Sheriff is to be amerced.

413

C H A P.

The Contents.

C H A P. XXVI.

Remedy against Sheriffs, Bailiffs, &c. for Malefeasance: As imbezilling an Exigent. For entering into a Corporation which had Retorna Brevium. For not delivering a Superedeas to the New Sheriff. For concealing or subtracting a Writ. (Bailiff of a Liberty chargeable for his Servant, not for the Gaoler.) For refusing sufficient Bail, and forcing to find extraordinary Bail. For taking Insufficient Bail. For not bringing Money levied by Fieri fac' into Court, and the Statute of Limitations pleaded. With several other Matters and Actions relating to Actions against Sheriffs, &c.

Page 418

C H A P. XXVII.

Of the Sheriff's Demeanour in Assignment of Dower, and the Return. The Proclamations. The Sheriff's Office about Partition. His Demeanour in the Writ De Ventre inspiciendo. About Returning a Force. About a Vi Laica removenda. How the Sheriff shall demean himself in a Writ of Enquiry of Waste, and of the Returns thereof. Of the Writ of Estrepmment, and the Return of it. The Sheriff's Office in an Excommunicato capiendo.

444

C H A P.

The Contents.

C H A P. XXVIII.

Of Returns of Clericus Beneficiatus, and of other Returns as to Clerks. The Return of a Writ of Entry, Assize, and Quare Impedit. The Sheriffs Office as to Election, and Returning of Burgesses and Knights to the Parliament. The Form of the Indenture for the Knights of the Parliament, and for the Burgesses. The Sheriffs Return of the Writ for Electing of Parliament-Men. Page 461

C H A P. XXIX.

Customs of London, as to Officers, Prisons, Courts, Process. Of the Sheriffs Court. How to lay the Custom of the Sheriffs Court. The Difference between the Mayor's Court and the Sheriffs Court, Sheriffs Court, when kept. The Manner of Entering Actions in the Counters. 470

C H A P. XXX.

The Sheriffs Duty as to the Assizes: And as to the Sessions of the Peace. 475

C H A P. XXXI.

Of Sheriffs and Officers Fees. Of Security and Remedy for Fees. What Security the Sheriff may take for Fees, or not. What Remedy the

The Contents.

the Sheriff shall have for his Fees. Where the Sheriff shall not take Fees. What shall be said Extortion in Sheriffs and Gaolers, and how Punishable. What shall be a good Consideration in Assumpsit for Fees, &c. Page 478

C H A P. XXXII.

Bonds or Covenants between the High Sheriff and Under-Sheriff, or other Officers. What shall be good in Law, or not: And when said to be forfeited, or not. 487

C H A P. XXXIII.

Of Sheriffs Accounts. 494

C H A P. XXXIV.

Of Coroners.

How the Coroners must be chosen, and the Credit the Law gives to them; and how and when they shall be discharged. The Coroners De-meanour as to Outlawries. Coroners Inquest, &c. 495, &c.

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S H E R I F F S, &c.

C H A P. I.

Of Counties. When the Realm was divided into Counties. Vicecomites. Notatio nominis. Sheriffs eligible in former Times; How made at this Day. The Sheriff's Honour, Power and Privilege. His Office not apportionable. What he may do as Conservator Pacis. How favoured in the Execution of his Office. Of his Assistance. In what Things and Cases he is restrained.

T H E Sheriff and the County being Correlated, I shall first give a few Observations about Counties, what they were Originally. *Vide Spelman, ver-
bis Comites,
Gemotum,
&c.*

Counties (a Word taken from the French), or Counties, Shires (a Word taken from the Saxons), are certain Circuits and Parts of the Kingdom, into which

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the

The Office and Duty of Sheriffs, &c.

the whole Realm was divided for the more convenient Government thereof, and is governed by a yearly Officer, which we call SHERIFF, which is compounded of two Saxon Words, Shipe and Reeve, Reeve signifying *Præpositus* or Governour.

* *Vid. Co. Lib. 5. Prefa. Leg. Ed. Confess. 35. Dalt. sh. 2.*

*Roll's 1. R. 237. **

As for the Time when and by whom this Realm was divided into Counties, Authors seem to differ. *Coke on Littleton*, fo. 168. holds, that they were divided by the *Britains*; but it is generally held (as *Ingulph, &c.*) that they were divided by King *Egbert* or *Ælfred*: But though *Egbert* united the *Heptarchy*, yet he was not the first that divided the

Kingdom into *Counties*, nor *Ælfred* neither, as some imagine: For as *Mr. Selden* observes, about the Year 700 (an hundred Years before *Egbert*) One

of *Ina's* Laws was; If any *felþepman*, i. e. Sheriff, were guilty of an Escape, *perdat Comitatum suum*. Therefore *Ingulphus* meant, that King *Ælfred* did divide it into Hundreds, or else made a more punctual Division than was before. Now it appears,

Comites, Vicecomites.

that the Earls of the Counties had the Custody and Guard of the Counties long before the Conquest; and when the Earls left their Custodies, then was the Custodies of Counties committed to *Viscounts*, and they are thereupon called *Vicecomites*, *quia vices Comitum supplent*. And we seem to derive all this from the *Romans*; for what we call *Comitatus*, was by them called *Consulatus*, and what the *Saxons* afterwards called *Aldorman*, or *Earl*, the *Romans* called *Consul*; and the Sheriff was Deputy of the *Consul* or *Earl*, and the *Romans* called him *Viceconsul*. *1 Inst. 168. Dugdale Antiq. War. Pref. Roll's 1 R. 237. C. 7. 33. & 9 Pref. Co. Lit. 168. Dalt. 5. Vide postea*, the Number of Counties in *England* and *Wales*.

County It is observed in *Mr. Dalton's Office vic' Fo. 2.*
Palatines That of these Counties, there be Four of Special Mark,

Mark, which are termed County *Palatines*, viz. of *Lancaster*, of *Chester*, of *Durham*, and of *Ely*. And the Chief Governours of these County *Palatines*, by especial Charter from the King, did all Things heretofore touching Justice absolutely, and in their own Name; but by the *Stat. 27 H. 8. ca. 24.* this Power of theirs is much abridged. *Vide Vaugh. Rep. 418.*

There be also Counties Corporate, and these be Counties certain Cities, or ancient Boroughs and Vills, upon Corporations which our Kings formerly have bestowed such extraordinary Liberties, as the Cities of *London*, *York*, *Chester*, and *Canterbury*, the Towns of *Kingston upon Hull*, *Lichfield*, and *Haverford*, &c. *Vide Co. Lit. 109. Dalt. 2.*

The Counties in *England* and *Wales*, viz.

In ENGLAND, 39.

<i>Bedford.</i>	<i>Leicester.</i>
<i>Berks.</i>	<i>Lincoln.</i>
<i>Bucks.</i>	<i>Middlesex.</i>
<i>Cambridge.</i>	<i>Monmouth.</i>
<i>Cornwal.</i>	<i>Norfolk.</i>
<i>Cumberland.</i>	<i>Northampton.</i>
<i>Derby.</i>	<i>Northumberland.</i>
<i>Devon.</i>	<i>Nottingham.</i>
<i>Dorset.</i>	<i>Oxon.</i>
<i>Durham.</i>	<i>Rutland.</i>
<i>Essex.</i>	<i>Salop.</i>
<i>Eboracum.</i>	<i>Somerset.</i>
<i>Gloucester.</i>	<i>Stafford.</i>
<i>Hereford.</i>	<i>Suffolk.</i>
<i>Hertford.</i>	<i>Surrey.</i>
<i>Huntingdon.</i>	<i>Sussex.</i>
<i>Kent.</i>	<i>Southampton.</i>
<i>Lancaster.</i>	<i>Warwick.</i>

The Office and Duty of Sheriffs, &c.

Westmoreland.

Wilts.

Worcester.

In WALES, 12.

Anglesey.

Flint.

Brecon.

Glamorgan.

Cardigan.

Merioneth.

Carmarthen.

Montgomery.

Carnarvan.

Pembroke.

Denbigh.

Radnor.

The Cities and Towns in *England* which have Sheriffs, are as follow:

The City of	Bristol	2
	Coventry	2
	Canterbury	1
	Chester	2
	Eboracum, or York	2
	Exon	2
	Gloucester	2
	Lichfield	1
	Lincoln	2
	London	2
The Town of	Norwich	2
	Worcester	1
	Kingston upon Hull	1
	Southampton	1
	Nottingham	2
	Poole	1
	Newcastle upon Tine	1

*Viccomes
habet
custodiam
Comitatus.*

In Roll's 1 R. 237. it is said, *Viccomes est un*
Grand Conservator del Peace. So that at this Day
the Sheriff hath all the Authority for the Admi-
nistration and the Execution of Justice, which the
Countee or Earl had, the King by his Letters Pa-
tents

tents now committing to the Sheriff *Custodiam Comitatus*. Co. 9. 49.

In 2 *Bulstr. Chune* and *Piott's Case*, *Coke* argues ^{Sheriffs} *endo* seems to be of Opinion, that there were no ^{before the} Earls before the Conquest. But the Meaning is, ^{Conquest} there was no Hereditary or Honorary Earl; but he that had the Title, had it as an elective Office, and held it at the Pleasure of the King, &c. For in the Preface to his Third Report, he is of Opinion, there were *Sheriffs* Time out of Mind before ^{3 Rep. Pref} the Conquest; and if so, then *Earls* were. To prove this, he gives an undeniable Argument, for that the Trials *per Juries*, which were always returned by the Sheriffs, were before the Conquest, even as appears by *Domesday Book*. Now we ^{Viscounts} know that Honorary *Viscounts* were not created till ^{Original.} the Time of *H. 6.* *Sed distinguendum*, &c. *Viscount* Co. 7. 33. signifies either a Title of Honour, or an Office of ^{Co. 9.} Trust. As a Title of Honour, it is of late standing as aforesaid, but as an Office of Trust, (*viz.*) for the Government of the County, it was Time out of Mind. And this Difference I ground upon *Cambden* in his *Britannia*: *Viscount* (saith he) *hac vetus officii, sed nova Dignitatis appellatio.* 9 *Rep.* in *sine de Lewes's Case.* *Camb.* pag. 160.

The Sheriff at Common Law was eligible by the ^{Sheriffs} Freeholders of the County, as the Coroner is at this ^{were eli-} Day; and then by the Death of the King, his Office ^{gible by} was not determind, no more than the Coroners are ^{the Coun-} now. 2 *Brownl.* 282. *Chamberlain* and *Goldsmith.* ^{ty.} *Post. Chap.* 34. 2 *Inst.* 558. &c.

By some Passages in the *Saxon* Laws and Chronicles, it seems the Freeholders of the County might (for Male Administration in his Office, &c.) depose him from being their Earl or Sheriff. But the Conqueror not thinking it safe to trust the People with this Power, nominated or created Earls of Counties *ad libitum*, either in Fee or for Life, or during

6 The Office and Duty of Sheriffs, &c.

Pleasure; and thus it continued till the *Stat.* called *Articuli super Chartas.* 9 *Ed.* 2. restored to the People their Right of electing their Sheriffs. See 2 *Inst.* 30.

How chosen at this Day, and when.

But by *Stat.* 14 *Ed.* 3. c. 7. & 21 *H.* 8 c. 20. the Judges are to nominate three Persons of every County to be presented to the King, that he may prick one of them, which by the Statute is to be done 3 *Novemb.* being *Craftin. Animarum*; and yet *An.* 16 *Car.* 1. because the 3^d of *November* was the first Day of the Parliament, and the Lords were to attend upon the King, it was resolved by the Judges, that it might be well put off till another Day; and the Lord Keeper deferred it till the 6th of *November.* *Cro. Car.* 595.

The King's Power therein. *Quare.*

But the Statute of *Artic. super Chartas* 9 *Ed.* 2. as 'tis said, restrains not the King's Power at Common Law; but the King may constitute a Sheriff without Election, or grant it in Fee; and he may still make Sheriffs without the Judges. *Dyer* 225. for all Acts of Grace flow from him. As *Dyer* 211. the Commission of Trial of Piracy upon the Statute of 28 *H.* 8. is good, tho' the Chancellor does not nominate the Commissioners as the Statute appoints, &c. And the Reason is given by my Lord *Hobart.* *Hob.* 14. b. *Colt and Clover's Case,* 214.

The Reason.

Statutes for Ease. *Quare.*

These Statutes therefore, and the like, were made to put Things in ordinary Form; and to ease the Sovereign of Labour, and not to deprive him of Power; the Election being merely in the King, and the Office ministerial only. And yet 'tis evident by the Common Law, no Man could exercise any Authority over others, without the previous Election of the Persons over whom he was to exercise such Authority.

The Honour, &c. of Sheriffs.

I will now set down some general Observations of the great Honour, Power and Privilege of Sheriffs,

Ch. I. Their Power and Privilege, &c. 7.

riffs, and wherein and by what Acts they are restrained.

One calls it *Judiciaria dignitas*, a judicial Dignity, as the *Earl* certainly was. *Fortescue* saith, and Not that *Viccomes* is *Nobilis Officiarius*. In *Savill's* *ble Officer*. *Rep.* p. 43. he is called a *Royal Officer*: For (saith the Book) *Charters of Liberties granted to the Barons of Cinque-Ports and other Inhabitants, shall discharge them of Inferiour Offices, as Constable, &c. but not of Offices Royal, as Sheriff.* 1 *Roll. Rep.* 274. *Phelp's Case.*

The Sheriff takes Place of every Nobleman in Takes the County, during the Time he is Sheriff. And Place of tho' the Sheriff be not a Justice of Peace, yet he is Noble- a Conservator of the Peace, and by this he may men. well imprison a Man upon good Cause. 2 *Roll. Rep.*

237.

Fitzherbert N. B. 81. b. at Common Law the Sheriff may commit any one for an Affront, or Commitments by him. Breach of the Peace, in his Presence, &c.

Such Persons as he shall apprehend upon Suspicion of Treason or Felony, upon fresh Suit or Hue and Cry, he may commit to the Gaol. Persons apprehended on Hue and Cry.

Upon any Foreign Invasion he may raise the County; so upon Rebellions and Insurrections; He may and may command any Number he thinks fit to raise the aid him. County.

But of his own Authority he shall not arrest any Man upon Suspicion of Felony, except there be a Felony committed in Fact, and he himself have Upon Felony committed. Suspicion of him.

By the Common Law, the Sheriff is the same Officer to the Court of King's Bench, as the Constable is to the Justices of the Peace. 1 *Salk.* 175.

By *Stat.* 17 R 2. c. 8. the Sheriff may raise the *Posse Comitatus* to suppress Rioters and commit them to Prison. 13 *H. 4.* c. 7. and if the Rioters resist, the Sheriff and his Assistants may justify the May suppress Rioters, &c. kill-

8 The Office and Duty of Sheriffs, &c.

killing them. *Vide the Stat 13 H. 4. c. 7. and the Stat of Northampt. 2 Ed. 3. c. 3. for this Purpose, & 13 Ed. 1. c. 39.*

May arrest and imprison them.

Wheresoever the Sheriff, or any other of the King's Officers may take *Posse Comitatus*, or have Authority either to execute the King's Process, or apprehend Felons, Rioters, &c. if they shall find Resistance, they may arrest and imprison all such Offenders.

What the Sheriff may do as *Conservator Pacis*; tho' not to act as a Justice.

He hath *Custodiam Comitatus*, and therefore for Cause he may commit: He is *Conservator Pacis*. And the *Stat. 1 Mar. c. 8.* doth not take away any Power from the Sheriff; only if he was in Commission of the Peace before, he is to forbear the Execution of his Commission for the Peace so long as he is Sheriff; but he is not to forbear the Execution of that which is committed to him for the County by the Common Law.

When he may commit Persons carrying Weapons &c.

The Sheriff favoured in the Execution of his Office.

Justificatio en faux Imprisonment.

The Sheriff, if he see a Person carry Weapons in the Highway *in terrorem Populi*, may commit him, tho' he does not break the Peace in his Presence. The Lord Coke cited the *Mayor of Barstaple's Case*, in *Chune and Piott's Case*, 2 *Bulstr.* Now the Case of *Chune and Piott* was this: One *Clare* was committed to the Compter of *Woodstreet*, and made his Escape; the Defendant being one of the Sheriffs pursued him, and in his Pursuit met with the Plaintiff in the Night-time *vagrantem*, who pursued him indecently, and gave him uncivil Words, & *detrustit ad murum*; whereupon he imprisoned him and justifies in *faux Imprisonment*. He doth not say, he did it *violenter*, or *contra pacem*, or *sciens*, knowing him to be Sheriff: But *per Cur'*, it shall be intended he did it *malitiose*, and the Law implies it was done *vi & armis*. It's a good Justification. Had the Defendant done it by Chance and unwillingly, he might have pleaded it, and his not Pleading it shews it to be otherwise. 2 *Bulstr.* 329. But the

Ch. I. Their Power and Privilege, &c. 9

the Mayor of Barstaple justified the Committing a Man, for that he did misbehave himself against him by ill Words, &c. Had this been laid to be done in the Execution of his Office, it had been good; but Mr. Mayor was then playing at Tables. *Vide 1 Sand. 79.* In an Action of Trespass, Battery *Simile for* and Imprisonment, the Defendant justified special-assaulting ly, as being one of the Sheriffs of the City of Coventry, guarding the Gaol and Prisoners, &c. And the Plaintiff came there and struck him, *per quod* he imprisoned the Plaintiff, &c. *Et hoc, &c.* And because the Defendant had said nothing to the *vi & armis*, the Plaintiff demurred to the Plea; yet Judgment was given *quod quer' nil capiat per Billam.*

Anciently the Bishop, with the Sheriff, went in Bishops Circuit twice every Year thro' every Hundred and Sheriffs within the County. *2 Inst. 70.*

The King cannot restrain any Part of the Sheriff's Power, neither can the King choose a Sheriff contrary to the Statute of *Lincoln.* The Office of Sheriff is entire, and cannot be apportioned. *The Office of Sheriff is entire.* Tho' the King constitutes a Sheriff *durante beneplacito*, and may determine it at Will; yet he may not determine it in Part, nor abridge him of any Thing incident to his Office. *Hob. p. 13. 2 Inst. 501. 4 Rep. 32. Milton's Case. 4 Co. 33. Finch 12.*

The Sheriff is an Officer of that Eminence, Confidence and Charge, that he ought to have all favoured Right pertaining to his Office, and ought to be in Law. favoured in Law before any private Person. I shall give you some Instances. *4 Rep. 33. b. Mitton's Case.*

Inasmuch as Escapes are so penal to Officers, the Escape. Judges have always made as benign Construction as the Law will permit in Favour of Sheriffs, and to the Intent that every one may bear his own Burden, they will never judge an Escape by strict Con-

Fresh Pursuit.

Construction. As if one in Execution escape and fly into another County, and the Sheriff retake him on fresh Pursuit, it's no Escape, if it be before

Carrying a Man upon an Habeas Corpus.

Action brought. So if the Sheriff by *Habeas Corpus* be commanded to bring the Body at the Day, he shall not be compelled to take the most direct Way, but the safest. *Vide infra*. Chap. 21, &c.

Erroneous Process.

The Sheriff is not punished for executing the Process of the Court, though it were erroneous. *Vid. postea*.

Killing of the Sheriff in doing his Duty is Murder.

If any Sheriff, Under-Sheriff, Serjeant or Officer who hath Execution of Process, be slain in doing his Duty, it's Murder in him who kills him, although there were not any former Malice between them; and if there were Error in awarding of Process, or in the Mistake of one Process for another; as a *Capias* in Debt against a Peer; and an Officer be slain in the Execution thereof, the Offender shall not have Advantage of such

Cro. Jac. 279. *Mac. kally's Case*.

Error, no more than a Sheriff who suffers a Prisoner to escape, shall take any Advantage of Error thereby. And in this Case there needs not a Special Indictment to be drawn; but a General Indictment, that such a Party *ex malitia sua præcogitata percussit*, &c. for the Law presumes Malice, tho' none be proved; so it is if any shall come in Aid of them; and an Officer, if he be resisted, is not bound to fly to the Wall, as other Subjects are.

9 Rep. *Mac. kally's Case*.

Severe Fines for assaulting the Sheriff.

Several Persons were informed against for assaulting the Sheriff in serving Execution, and fined Sir *J. Wingfield* the Prisoner at 500*l.* and *Brady* 500 Marks, because it appeared upon the Evidence he drew his Sword and wounded the Sheriff, and by that Means the Prisoner escaped into *Neale's* House; and 180 *l.* against *Neale*, because he kept out the Sheriff, and shut the Door against him; and 500*l.* against Sir *T. B.* because he was the Means of conveying away the said Prisoner to

Lin-

Ch. i. Their Power and Privilege, &c. 11

Lincoln's Inn ; and *per Cur'* such Fines assessed in Court by Judgment on *Information*, cannot be afterwards qualified or mitigated. *Cro. Car.* 251.

B. R.

The Sheriff's Bailiffs lawfully arrested a Man, if the Persons which stood by refuse to assist them, (in Case of Opposition) they shall be fined. *Winch* ^{For refusing to assist him or his Bailiffs.} *p. 72. Foster's Case.*

Every Man is bound by the Common Law to assist, not only the Sheriff in his Office for the Execution of the King's Writs according to Law; but of also his Bailiff that hath the Sheriff's Warrant in that Behalf, hath the same Authority which his Master hath: For the Sheriff cannot do all himself, and if they do it not, being required, they shall be fined and imprisoned; but in the Case of *Replevin* out of a Castle, House, &c. before the Sheriff useth any Force, he ought to demand (according to Law) the Goods to be delivered, so as *Replevy* may be made thereof; for *sequi debet potentia mandatum Legis, non precedere.* 2 *Instit.* 193.

Now besides the Warrant of the Common Law, the Sheriff has his Letters Patent of Assistance, whereby the King commandeth, that all Archbishops, Bishops, Dukes, Earls, Barons, Knights, Free-men, and all other of that County, be to the Sheriff thereof, *in omnibus quae ad Officium illud pertinent, intendentes, auxiliantes & respondentes.* ^{The Sheriff's Letters Patent of Assistance.} *Id. ibid.*

As to the Sheriff's Power in breaking up Houses, *vid. infra. Tit. Execution.* Only I shall observe on Process for the Good Behaviour, the Sheriff may break an House to take the Party; as if the Sheriff have a *Cap'* against one, to find Sureties of the Good Behaviour. *Vide Moor* 66.

The Sheriff or his Ministers in the Execution of May carry Justice, may carry a Dag or Hand-gun, and it's no Offence against the Statute. 5 *Rep.* 71. *St. John's Case.* ^{Wearpons.}

The

In what
Cases ex-
cused
from do-
ing
Wrong.

The Sheriff in some Cases shall not be a Disseisor for executing the King's Writ, tho' he doth Wrong, for Officers in such Cases are excused by their Warrant. As it was found *ex Officio*, that the Church was full of *B.* who was a Stranger to the *Quare Impedit*, and it appears not that he had better Title; yet the Plaintiff ought to have a Writ to the Bishop generally. So it is of a Sheriff on *Habe-re fac' seisinam* of Land, for it cannot come in Issue between the Demandant and him, for he had no Day in Court; and though a third Person had Right, they are excused by their Warrant. 6 *Rep.* 52.

*Posse Co-
mitatus.*

If the Sheriff be resisted in executing the King's Writs or Procefs of Law, he may take the *Posse Comitatus*; so he may to suppress Rioters. *Vide supra, & 3 Instit.* 161.

Enquiry
of the
Life of
one ab-
sent, &c.

As for other Judicial Office of the Sheriff, as Enquiry of Waste, Redisseisin, &c. *vide* under their proper Titles. By the Statute 21 *Jac.* c. 13. the Life of the Party absent, during whose Life the Defendant had a Lease, is to be enquired by the Sheriff. 1 *Keb.* 176.

Recusant
Convict.

Per Stat. 23 *Eliz.* A Recusant Convict shall after Proclamation at the Assizes or Gaol-delivery render his Body to the Sheriff, before the next Assizes. 2 *Keb.* 108. *Le Roy & Web.*

In what
Things
he is re-
strained.

But notwithstanding the Dignity and Favour the Law Casts on Sheriffs, yet in many Places they are restrained, and have limited Qualifications, which will further contribute to the explicating the Nature of the Sheriff's Office.

Not to be
chosen a
Parlia-
ment
Man.

The Sheriff of the County is not to be chosen a Parliament Man. *A.* 12 *Jac.* 1. Sir George Selby was made Sheriff of *Durham*, and elected Knight for *Northumberland*; it was resolved in Parliament, that the Election was void.

Mr.

Mr. *Walter Long's* Case was warmly argued; he was informed against first, That he being made Sheriff of the County of *W.* and having taken the Oath to be dwelling in his County all the Year, unless he had Licence of the King, had committed Perjury, in as much as he was absent out of the County three Months together. He said, he was elected Burgeſs for *Bath*, and by Virtue of a Writ of Summons under the Great Seal, which he conceived amounted to a Licence. The Statute is 4 *H. 4. cap. 5.* every Sheriff shall dwell in his proper Person in his Bailiffwick for the Time that he shall be Officer; the Words are *Demurrant*, not *Abiding*. *Quære* if the King may elect one of the House to be Sheriff, or if this is a Dispensation? But it appeared Mr. *Long* sought to be elected Parliament Man, after his Nomination to be Sheriff.

By the Stat. of 23 *H. 6.* no Man shall serve the King as Sheriff of any County above one Year, and that notwithstanding any Clause of *Non Obſtante* to the contrary; that is, notwithstanding the King should expressly dispense with that Statute. And yet 'tis agreed, that against the express Purview in the Act, the King may by a Special *Non obſtante* dispense with that Act, (except such as are inheritable to the Office of Sheriff, or other Offices in *London*); and that they may execute their Office during *Mich.* and *Hillary* Term, if no Writ of Discharge come. *Vid. 12 E. 4. c. 1. 7. Rep. 14. Calvin's Case.*

Every Sheriff is to be resident in his own Person within his County during the Time he is Sheriff, (except he be otherwise licensed by the King) *per 4 H. 5. c. 5.*

A Sheriff of one County hath no Authority or Power within another County; yet the Sheriff by Force of the King's Writ may carry the Prisoner through several Counties, or make fresh Pursuit into

Mr. *W. Long's*
Case. *Lit. Rep.* 326.

Non obſtante, &c.

How to
be resi-
dent.

Hath no
Power in
another's
County.

The Office and Duty of Sheriffs, &c.

to other Counties, and the Prisoner shall be said to be in the Custody of the first Sheriff in every County.

Not to
let his
County
to Farm.

The Sheriff is not to let his County to Farm, *per Stat. 23 H. 6. c. 10.* By the Sheriff's letting his County to Farm, is understood of the *proficua Comitatus*, which were considerable, when most Law Suits were transacted in the Counties and in Hundred Courts, Fines, Issues and Amercements being considerable. And in the Time of *H. 3.* the *Bailiffwick* of one County was let at 100 *l. per Annum*, a great Sum in those Days. There was a Bond for Rent on a Lease of the *Bailiffwick* of the *Savoy*. Now the *Stat. 27 H. 8. c. 24.* being a general

3Keb.678.
Ellis and
Nelson.

Statute, and the Conclusion General *contra formam Statuti*, will avoid this Contract, *per Stat. 23 H. 6.* The Security is void, tho' it hath no express

Words to avoid it; but *per Curiam*, 23 *H. 6.* being a particular Law, should have been pleaded, and the *Stat. 27 H. 8.* is but a Relative Statute. *Per Stat. 4 Ed. 3. c. 9.* the Sheriff shall not let Hun-

NorHun-
dred.

More W.
1021.

Stockwith
andNorth.

dreds to Farm. It was resolved in *Stockwith* and *North's Case*, that the Letting to Farm Offices was *malum prohibitum*, against the *Stat. of 4 H. 4. c. 5.* and also *malum in se*. And therefore, because the Sheriff of *Nottingham* took Money for the Gaolership, and the *Bailiffwick* of the County for one Year, he was fined in the *Star-Chamber*. The Penalty for offending these Laws is 40 *l.*

How he
may be
guilty of
Homi-
cide.

Though the Sheriff be so much favoured and respected in the Law, and in the very Execution of Criminals; yet he shall be guilty of Homicide, for not observing the Order of Law in putting a condemned Man to Death. 7 *Rep. 13. 1 Jac.*

What
Prescrip-
tion by a
Sheriff,
good or
not.

A Sheriff may not prescribe, that he and all those who have been Sheriffs have been seized of a certain Gift at every Turn held, &c. for the Sheriff

riff is put in by the King every Year, and remove-
able at Pleasure. *Vide* 42 *Ed.* 3. 5. But in 21 *Fees.*

H. 7. 17. *b.* an Under-Sheriff prescribes, that he
and all Under-Sheriffs of the County have used
to have so much for *Bar Fees*, and admitted good.

Of Sheriffs Fees, *vide chap.* 31. And note, an Sheriff
Under-Sheriff can't refuse to execute Process till he ^{Sheriff} ~~punish-~~
has his Fee, and if he does he may be indicted for ^{ble.}

Extortion. 1 *Salk.* 330, 331. See the Case 1 *Salk.*
176, 177. where an Under-Sheriff was fined and
committed for delivering up a Writ of Appeal
(to be cancelled) which had been brought by his
Prochein amy. Where the Sheriff or his Officers
shall be otherwise punishable. *Vide postea.*

C H A P. II.

What the Sheriff must do at the Entrance into his Office. The Form of the Writ of Discharge of the Old Sheriff. The Form of his Oath, how and before whom to be taken, and the Return. Of Delivery of Writs and Prisoners by the Old Sheriff to the New. Till what Time the Old Sheriff or his Officers may act. What's to be done in the Case of the King's Death. What shall be said a good Delivery of Prisoners, and how to be made. The Form of the Indenture setting over the Prisoners, and the Writs. The Form of the Return of those that have been executed by the Old Sheriff. What Acts the Old Sheriff may or must do after his Discharge, and what Remedy against him for a Misdemeanour in his Office. When and where the New Sheriff must read his Patent, and make his Deputies in the County and Courts above. How and in what Cases his Office is determined before the Year be out.

2 & 3 Ed. 6. ca. 34. **H**E must go into the Remembrancer's Office in the Exchequer, to enter the Recognizance with Sureties, (or some for him) with Condition for Entring into a Recognizance for Payment of his Proffers or Accompts which is twice in the Year, (*viz.*) at or before *Mense Pasch* & *Mense Michaelis* then next following. Then of his his Attorney or some other will write him a Note, Proffers, signifying that he is Sheriff of such a County, and hath entred into Recognizance; the which Note Writs of the Sheriff must deliver to one of the Six Clerks in Assistance Chancery to make his Patent by, with a Writ of Assistance, and a Writ of Discharge to be delivered and Discharge.

ed to his Predecessor, which should be delivered with all Speed to his Predecessor, for the Benefit of his Under-Sheriff, because till it be delivered, the precedent Sheriff may do Execution of all Process.

The Patent of his Office runs thus.

GEORGIUS Dei Gratia Magna Brit' Fra' & Hib' Rex Fidei Defensor, &c. Omnibus ad quos presentes Literae pervenerint salutem. Sciatis quod commissimus dilecto nobis A. B. Militi Comitatus nostri Essexiae cum pertinent' custodiend' quamdiu nobis placuerit. Ita quod Firmas Debitas nobis reddat Annuatim ac de Debitis nostris & omnibus aliis ad officium Vicecomitis nostri predicti spectan' nobis respondeat ad Scaccar' nostrum. In cujus rei Testimonium has Literas nostras fieri fecimus Patentes. Teste meipso apud West' 21 Die Novem' Anno Regni nostri Duodecimo.

The Patent of Assistance runs thus.

GEORGIUS, &c. Archiepiscopis Episcopis Ducibus Comitibus Baronibus Militibus liberis Hominibus & omnibus aliis de Com' Essexiae salutem. Cum concesserimus dilecto nobis A. B. militi Officium Vicecomitis Com' nostri predicti cum pertinent' habend' quamdiu nobis placuerit prout in literis nostris patentib' ei inde confectis plenius continetur, vobis Mandamus quod eidem A. tanquam Vicecom' nostro Com' predicti in omnibus quae ad officium illud pertinen' intendent sitis auxiliantes & respondentes. In cujus, &c.

So that the Sheriff is made by Letters Patents of Record, and therefore if it shall come in Question whether he be Sheriff or not, it may be tried by
 C the

18 The Office and Duty of Sheriffs, &c.

the Record; or it may be by Examination of the Sheriff himself. *Vide* 10 H. 4. 7. 32 H. 6. 27. 9 Co. 31.

The Form of the Writ of Discharge directed to the Old Sheriff, is thus.

Writ of Discharge.

GEORGIUS, &c. dilect' sibi J. S. Armig. nuper Vic' Essex salutem. Cum concesserimus Dilecto, nobis A. B. Armig. Comitatum nostrum predict' custodiend', quamdiu nobis placuerit, prout in Literis nostris patentibus ei inde concess' plenius continetur. Tibi precipimus qd' eid. A. B. Com' nostr' prad' cum pertinentiis una cum Rotulis Brevib' Memorand' & omnibus aliis ad officium Vicecom' prad' spectan' qua in custodia tua existunt per Indenturas inde inter te & prasat' A. B. debite conficiend' liberes: Teste meipso apud West' quinto die, &c.

Oaths to be taken. In the next Place, he must go to a Master of the Chancery, or to one of the Judges of Assize of that County whereof he is Sheriff, and take the Oath of Supremacy by the Statute appointed. And also an Oath for the due Execution of his Office, which formerly was thus.

Oath of Office.

Dalt. sh. 9. See the Oath appointed by Stat. 3. Geo. versus Fidem.

YE shall Swear, That you shall serve the King well and truly in the Office of Sheriff of E. and do the King's Profit in all that belongs to you to do by Way of your Office, as far forth as you can or may. Ye shall truly keep the King's Rights, and all that belongeth to the Crown. Ye shall not assent to Decrease, to Lessenings, or to Concealments of the King's Right, or of his Franchises; and whensoever ye shall have Knowledge that the King's Rights, or the Rights of his Crown be concealed or withdrawn, be it in Land, Rent, Franchise or Suit, or any other Things, Ye shall do your true Power

to make them be restored to the King again; and if ye may not do it, ye shall certifie the King, or some of his Council thereof, such as ye hold for certain will say it to the King. Ye shall not respite the King's Debts for any Gift or Favour, where you may raise them without great Grievance of the Debtors. Ye shall truly and righteously treat the People of your Sheriffwick, and do Right as well to Poor as Rich in all that belongeth to your Office. Ye shall do no Wrong to any Man for any Gift or Behest, on Promise of Goods for Favour, nor Hate. Ye shall disturb no Man's Right. Ye shall truly acquit at the Exchequer, all those of whom ye shall any Thing receive of the King's Debts. Ye shall nothing take whereby the King may lose, or whereby that Right may be disturbed, letted, or the King's Debt delayed. Ye shall truly return, and truly serve all the King's Writs, as far forth as shall be within your Cunning. Ye shall not have to be your * Under-Sheriff, any of the * Nota. Sheriff's Clerks of the last Year past. Ye shall take no Bailiff into your Service, but such as ye shall answer for. Ye shall make each of your Bailiffs to make such Oath, as ye make your self in that, that belongeth to their Occupation. Ye shall receive no Writ by any of you or yours unsealed, or any sealed under any Seal of any Justice, save of Justice in Eyre, or Justice assigned in the same Shire where ye be Sheriff in, or other Justice having Power or Authority to make any Writs unto you by the Law of the Land, or any Justice of Newgate. Ye shall make your Bailiffs of the true and sufficient Men in the County. Ye shall be dwelling in your proper Person within your Bailiffwick, for the Time ye shall be in the same Office, except ye be otherwise licensed of the King. Ye shall not let your Sheriffwick, nor any Bailiffwick thereof to Farm to any Man. Ye shall truly set and return reasonable and due Issues of them that be

4H. 4. c. 5.
23 H. 6.
c. 10.

The Office and Duty of Sheriffs, &c.

It seems within your Bailiffwick after their Estate and their
 this latter Honour; and make your Pannels your self of such
 Part of Persons as be most next, most sufficient, and not
 the Oath suspected or procured, as it is ordained by the Sta-
 is of late tutes, and over this in eschewing and Restrainer of
 Time ad- ded. Vide the Manlaughters, Robberies, and other manifold
 Register grievous Offences that have been done daily, namely,
 fo. 301. & of such as name themselves Soldiers, and by other
 Cro. Car. Vagrants, the which continually increase in Number,
 18, 25. and multiply, so that the King's true Subjects may
 * Sure not * be safe; yea, Ride, nor go to do such Things
 ride nor as they have to do, to their intolerable Hurt and
 go to do, Hindrance: Ye shall truly and effectually, with all
 &c. Diligence possible to your Power, execute the Sta-
 Dalt. tutes, as the Statutes of Winchester, and of Vaga-
 sb. 10. bonds. These Things all ye shall truly keep, as
 God ye help.

Note, That there was an Addition in this
 Cro. Car. Oath by the Statute of 5 R. 2. and 2 H. 4. c. 15.
 p. 25, 26. (viz.) That he should seek to repress all Errors and
 Sir Edw. Heresies commonly called Lollards, and should be
 Coke's Case assistant to the Commissaries, and Ordinaries in
 Dalt. f. 10. Church Matters. And this was objected by Sir Ed.
 & 510. Coke, after he had been Lord Lord Chief Justice of
 both Benches, and made Sheriff of the County of
 Buckingham, when he had a *dedimus potestatem* an-
 nexed to a Schedule of the Oath, in the First Year
 of Charles the First: And ever since they have been
 left out, because Lollardism then was the true
 Antipapal Religion, as is now professed. And he
 made other Objections, One whereof was, that
 some Parts of the Oath are not by any Statute;
 and it's a Maxim, That none but the Parliament can
 None but the Par- appoint an Oath: But it was resolved by the Judges,
 liament can ap- that this Oath being appointed, and continued di-
 point an vers Years by the Direction of the Statute, altho'
 Oath. without the expresse Authority of any Statute
 Law;

Law; yet may well be continued for the Publick Benefit.

Note, As to the Statute of *Winchester* of Hue and Cry, the Justices of Peace have eased the Sheriff of much Trouble. And by the Statute of 39 *Eliz. cap. 4.* all former Statutes for the Punishment of Vagrants and Vagabonds are repealed. *Dalt. S. fol. 12.* so that the Sheriff doth not now intermeddle therewith.

The Oath of the Sheriff of *Oxford* and *Berks*, and also of *Cambridge* and *Huntingdon*.

YOU shall Swear, That well and truly ye shall Serve the King in the Office of Sheriff of Oxford and Berks, And the King's Profits, &c. ut supra usque, So help ye God. And also ye shall Swear, That the Masters and Scholars of the University of Oxford, and their Servants, from Injuries and Violences, ye shall keep and defend by all your Strength and Power; and the Peace in the said University as much as in you is, ye shall keep. And that you shall give your Counsel and Help to the Chancellor and Scholars of the same University, for to punish the Disturbers and Breakers of the Peace there, after the Privileges and Statutes of the said University, at all Times when it shall be needful. And also, ye shall put your Help with all your Strength to defend the Privileges, Liberties and Customs of the said University. And that ye shall receive all such Oaths of your Under-Sheriffs, and other your said Ministers of your said County of Oxford, as soon and anon as ye shall be at the Castle, or at the Town of Oxford, in Presence of any that shall be thereto deputed by his Majesty or the said University. As God you Help.

The Office and Duty of Sheriffs, &c.

The like Addition to the Oath of the Sheriff of *Cambridge* and *Huntingdon*, *mutatis mutandis*; which Additions were lately made out of a Respect to the Universities.

But see now the late Stat. 3 *Geo.* c. 15. whereby new Oaths are appointed for both the High-Sheriff and Under Sheriff, instead of the foregoing Oaths. *vide post. versus Finem.*

If the new Sheriff be not in *London*, he may take his Oath by *dedimus potestatem*, directed to any two Justices of Peace of the same County, One to be of the *Quorum*, or to any other Commissioners, or before One of the Judges of the Assizes of that Shire, or One of the Masters of *Chancery*.

The Return of the *Dedimus* by the Commissioners, is thus:

Return of
Dedimus. **V**irtute istius Brevis nobis direct' (tali Die & Anno) recepimus Sacrament' infranominat' A. B. Vicecom' *Essex* tam de Offic' Vicecom' in dict' Com' *Essex* bene & fidelit' faciend' juxta formam cujusdam Schemulae presentibus annex' secundum tenorem Brevis & Schemulae Brevis praed' similiter annex' prout Breve istud in se exigit & requirit. *Vid. Dalt. 13.*

Oath and
Sacra-
ment. The Sheriff must also take the Oath and Sacrament as is now usual for all Officers and Ministers of Justice. Stat. *Car. 2.* and the Oaths appointed by the Statutes of *William* and *Mary*, &c. *Georgii.*

Writ of
Discharge. But in the general Case of the Sheriffs of *England*, when the King makes a new Patent, tho' the ancient Sheriff had his Office but *durante beneplacito*, presently a Writ of *de Comitatu Commisso* (which is commonly called a Writ of Discharge, or a Writ *de Exoneracione Officii*) shall issue: The Form *vide supra.*

The next Thing is, the new Sheriff at or before his first County-Court, must take over from his

Ch. 2. Their Oath and Sacrament taken. 23

his Predecessor all his Prisoners and Writs precisely Taking
by View, and by Indenture to be made between over Pri-
them, wherein all the Causes which he has against soners,
every Prisoner must be set forth and delivered, or &c. by
Inden-
else the new Sheriff is not charged with them, as ture.
in *Westbie's Case*. Co. 3. 72. *vide post*. 24.

Now before I say more as to the Delivery, I
shall shew you what Actions of the old Sheriff,
or his Officers, shall be good, and to what Time.

The old Sheriff of a County is Sheriff until the Till what
new be sworn, although he be chosen; for it is the Time the
Taking of his Oath that doth compleat him in his old She-
Office. And the Arrest is good by the old Sheriff, riff, or the
till a new Patent be shewed to him, or other suf- new She-
ficient Notice. *Cro. Eliz.* 12. *Fitz's Case*. The act.
Acts of the old Sheriff are good, till a Writ of
Discharge received. *Moor* 186. And a Bailiff Er-
rant may execute a Warrant of an old Sheriff made
before a Writ of Discharge, altho' a new Sheriff
be chosen. *Moor* 364. *St. John's Case*.

For if the Sheriff takes a Man in Execution, For what
and afterwards a new Sheriff is made, and after- Prisoners
wards and before the antient Sheriff delivers this the new
Prisoner over by Indenture to the new Sheriff, the Sheriff
Prisoner escapes, here the old Sheriff only is charge- shall be
able for this Escape, and not the new Sheriff; for charge-
able.
the new Sheriff shall be chargeable for no other Escape.
Prisoners than what are delivered over to him by
Indenture. *Dalt.* 515. *Cro. Eliz.* 365. 2 *Roll* 457.
Hob. 266. 1 *Bul.* 70. *usque* 79. 2 *Leon.* 54.

Where the new Sheriff is chargeable upon an Upon the
Arrest by the old Sheriff's Return of *Languidus*, old She-
the Party remaining always in Prison. *Cro. Jac.* riff's for-
380. *Dalt.* 516. See after. mer Re-
turn.

And in *Cro. Eliz.* 440. Action on the Case was
brought against the Sheriff; and the Plaintiff de- *Boucher*
clared, Whereas he had recovered 100 l. and had and *Wise-*
a *Fieri Facias*, and the Defendant by Virtue thereof *man*.

Execution executed the same Day that the Writ of Discharge came. levied 28 l. and had not returned the Writ, nor paid the Money to the Plaintiff. On Not Guilty pleaded, in Evidence it was proved, That the Writ was delivered to C. the Defendant's Under-Sheriff, 9 No. 34 *Eliz.* and the same Day he made Execution; and he proved, That the same Day a Writ of Discharge was delivered to him. 6 No. 35 *El.* but he did not prove he had Notice of this Writ of Discharge, before the Execution served: *Per Cur'* he was yet Sheriff, and chargeable to the Plaintiff's Action. The antient Sheriffs ought to give Notice of all Executions against any in their Custody, to the new Sheriff, although the Executions are of Record; or otherwise the new Sheriff shall not be chargeable with them. But if the old Sheriff die, the new Sheriff at his Peril shall take Notice of all Executions which are against any that he finds in the Gaol; and this is of Necessity, for there is none to deliver over the Prisoners to him: And in such Case the new Sheriff is to take Notice of all the Writs. *Dalt.* 17, 517. 3 *Rep.* *Westbie's Case.* *Moor* 688. *Poph.* 85. *mesne Case.*

Notice of Executions to the new Sheriff.

3 *Rep.*
Westbie's
Case.

Executions to be mentioned in the Indenture.

The Delivery over of the Prisoners must be by Indenture, and every several Execution against every of them must be therein mentioned. And therefore in the great Case to this Purpose, *viz.* *Westbie's Case*, The Sheriffs of London by Indenture deliver over *J. S.* (who was in Execution at the Suit of *A.* and *B.* severally) and only mentions the Execution of *A.* and *J. S.* escapes, *B.* brought Debt against the old Sheriffs, and adjudged that the Action well lies; for he cannot be in Custody of the new Sheriff for this Execution, because they were not charged with this Execution, and the Fault was in the old Sheriffs, in omitting it on their Indenture, and the Escape commenceth *eo Instanti*, that the antient Sheriffs deliver their Prisoner to the new, for then they cease to have the Custody

Custody of him; and though he remains in the Walls of the Gates, 'tis an Escape in Law. 3 Rep. *Westbie's Case. Vide Cro. Eliz. 265. Roll 2 Part 457. Hob. 266. 1 Bul. 70. 2 Leon. 54.*

And until the Prisoners are delivered to the new Sheriff, they remain in the Custody of the antient Sheriff, notwithstanding the new Patent, the Writ of Discharge, and the Writ of Delivery.

As to the Prisoners in Execution, in case of the Death of the Sheriff, *vide infra, Tit. Execution.* And see after Chap. 21. *Of Escapes.*

Death of the Sheriff.

And note by Stat. 3 Geo. c. 15. Sect. 8. which see versus *Finem*, on the Death of the High-Sheriff, his Under-Sheriff is to continue, and execute his Office.

What is to be done in case of the King's Death.

By the Death of the King, the Sheriff's Office ceaseth, and therefore in the next King's Time, a new Patent is immediately sued out; yet if a Prisoner escape between the Death of the King and the new Patent, the Sheriff shall be charged; for he ought to have made his Gaol safe. *Vide supra, Westbie's Case. 7 Co. 30. Dyer 165. Br. Office 25. Dalt. 17.*

In *Smallman and Lane's Case*, it was the Opinion of all the Justices, That by the Law the old Sheriff ought to deliver the Body of him who is in his Custody, by View to the new Sheriff, and such Prisoners ought to be brought to him to view; and from that Time the Law shall judge the Prisoners in the Possession of the new Sheriff, and not before. 2 Leon. 54.

What shall be said a good Delivery, and how to be made.

D. Sheriff of *Warwick* had one in Execution, Of one whom he kept in a private Prison by himself, for all his Executions in the Town of *Warwick*; and when he was discharged of his Office, and a new Sheriff made, D. said to the new Sheriff, That he not bound to receive Prisoners from the old Sheriff, but at the Gaol; yet if the other will receive them out of the Gaol, the old one is discharg'd. *Dabridgcourt's Case largely cited in Westbie's Case. Pop. 85.* How a Prisoner shall be turned over by B. an antient Sheriff, to H. present Sheriff, who was not before turned over by B. to C. nor by C. to H.

kept in a private Prison. The new Sheriff

had

had such an one in Execution in his Custody, and offered to the said Sheriff to put him in the Indenture amongst his other Prisoners delivered to the new Sheriff; but the new Sheriff refused to receive him, unless *D.* would deliver him into the common Gaol of the County, which was in the Town of *Warwick*, and then the Prisoner escaped. *D.* was charged with this Escape, for the new Sheriff is not compellable to take the Prisoners of the Delivery of the old Sheriff, but in the common Gaol of the County. And if the Sheriff dies, the Party shall be rather at a Prejudice, than the new Sheriff without Cause charged with him: And in such a Case, the Party who sued Execution, may help himself, (to wit) by a remanding of the Body by a *Corpus cum causa*, whereby he may be brought to be duly in Execution, and this under a due Officer.

There was an *Habeas Corpus ad recipiend'*, &c. for *W. W.* to *H.* Sheriff of *Glouc'*, and he moved the Court for their Advice, because *W.* was in Execution when *B.* was Sheriff, and was left in the Gaol when *C.* was Sheriff; but he was not turned over by Indenture to *C.* nor to *H.* but was yet in the Gaol, and had been charged with a new Execution, which they were ready to return, but pray that he shall not be inforced to return the other Execution, because he was not in Custody to him for this. *Per Cur'*, he shall not be compelled to make other Return, but for the first Execution he shall yet remain in the Custody of *B.* the antient Sheriff, tho' his Body be in the Custody of the new, because he was not turned over by Indenture; and the Difference between this and *Westbie's* Case is, That there the Prisoner was turned over for one Debt, and not for the other; and therefore an Escape for that. And *per Cur'* *B.* the antient Sheriff may turn him over by Indenture to *H.* the

It must be
by *B.* to *H.*
and not
by *B.* to *C.*
&c.

H. the present Sheriff (for it ought not to be to C. for he never was in his Custody) and then he will make Return of all the Executions. *Siderfin* p. 335. *Hanmer and Wicomer. Vide 2 Keb. 224.*

Note, It was said by *Hobart, Winch* 51. in *Emp- Fees to som and Bathurst's Case*, If the Sheriff makes an Extent, and before a Liberate a new Sheriff is chosen, in this Case the new Sheriff shall have the Fees appointed by the Statute. *Dalt. 517.* the new Sheriff.

The Form of an Indenture for setting over Prisoners and Writs between the old and new Sheriff.

This Indenture made, &c. Between A. B. Esquire, late Sheriff of the County of Warr^s of the one Part, and C. D. Knight, now Sheriff of the said County, of the other Part: Witnesseth, That the said A. B. by Virtue of his Majesty's Writ of Discharge (of his late Office) to him directed, hath delivered and set over unto the said C. D. these Writs following, (That is to say) a Capias against W. H. Ret^r Octab^r Hill. ad sect^r Johannis Smith, &c. together with the Bodies of J. N. in Execution at the Suit of G. H. for a Debt of 22 l. and J. H. at the Suit of C. D. in Execution for 10 l. and R. G. in Execution as well at the Suit of O. D. for a Debt of 100 l. as also at the Suit of N. W. for a Debt of 40 l. in, &c. In witness, &c.

All the Writs which are set over in the Indenture between the Sheriffs, if they have been executed by the old Sheriff, then they must be returned by him, or in his Name, and indorsed under by the new Sheriff, thus:

Istud Breve prout indorsat^r mihi deliberat^r fuit Dalt. S. per A. B. Armig^r, Vic^r prox^r prædecessor^r meum fo. 18. in exitu ab Officio suo.

Per C. D. Mil^r Vicecom^r.

What

What Acts may or must the old Sheriff do after he is discharged, and what Remedy against him for a Misdemeanour in his Office.

In what Case *Process* shall be to the old Sheriff. Generally the Sheriff that begins an Execution shall finish it, tho' his Office is expired; Therefore *Process*, in some Cases, may be to the old Sheriff, to bring in the Body of a Prisoner; and that is, where before he hath made a Return of *Cepi Corpus & parat' habeo*, and afterwards he is removed, and a new Sheriff made; on Non-appearance of the Prisoner, *Process* shall go to the old Sheriff by *Distringas*. 1 *Bulstr.* 82. *Egerton and Morgan*.

Upon a *Cepi corpus* turn *Cepi corpus*, and have not the Body ready he shall be amerced, and a *Distringas* shall be awarded to the Coroners. But if the old Sheriff at the Day return *Cepi corpus*, and before the Day of the Return is removed, and a new one is made, the *Distringas* here shall be awarded to the new Sheriff, if it appear on the Record that he has taken the Body.

A Sheriff on a *Fieri fac'* seised Goods in his Hands to the Value of the Debt, and paid Part of the Debt; and the Goods not being sold, nor the Writ returned, the Sheriff was discharged, and afterwards sold the Residue of the Goods without any *Vendition' exponas*. And *per Cur'* the Sale is good; for the Writ of *Fieri fac'* gave Authority to him to sell without any other Writ. 2 *Cro.* 73. *Ayer and Aden*. Therefore, *Moor* 757. the same Case is misreported, which saith, If the Sheriff takes Goods by *Fieri fac'*, and then is discharged, he may not sell them, but ought to deliver them to the new Sheriff, and return *quod non invenit emptores*. And *Telverton* in the same Case agreed with *Crook* on *Fieri fac'*, *sed non inveni emptores*, a *Distringas*

stringas to sell shall go to the old Sheriff, and not to deliver the Goods to the new one. *Moor* 757. *Distringas*
Telv. 44. *Cro. Jac.* 73. *Aden* and *Ayre.* 2 *Keb.* 821.
Mildmay and *Smith.*

The Sheriff sold Goods upon a *Fieri fac'*, and New Sheriff upon a *Venditioni exponas*, he returned *non invenit emptores*, then his Office determined, and he still detained the Goods in his Hands, and it was said, the Plaintiff had no other Remedy against the old Sheriff, but to have Issues upon him. *Dixon's Case,* *Latch.* 117. *Dalt.* 516. *Remedy, but by Issues.*

If Money be paid to the old Sheriff, and he is discharged before the Return of the Writ, the Party shall not be compelled to pay it again; and the Plaintiff may have his Remedy against the ancient Sheriff, if he will. *Cro. El.* 209. *Rook* and *Wilmott.* *Where Party paid the Money to the old Sheriff.*

The old Sheriff returned the Proclamation upon an *Exigent* after that he was discharged of his Office, and by the Judgment of the Court the Outlawry was void, and the Party was discharged. *Dyer* 41. *Proclam. returned by him.*

Note this for a Rule, That that which comes after the *Nuper* is not traversable, unless the Party be charged by Reason of his Office; as if he be called in pleading *Nuper Vicecomes, nuper Escheator, &c.* 38 *H.* 6. 18. *Traverse of Nuper.*

If Attachment may be granted against a Sheriff for Contempt, after he is removed out of his Office; the Justices said, They could not do it, for now he is no Officer, and cannot now be fined, and without Fine they do not use to imprison. *2 Brownl.* 144. *Old Sheriff not to be fined for a former Contempt.*

So Style: A Sheriff out of his Office cannot be fined by the Court, but a Tipstaff may be sent for, to bring him in to answer the Misdemeanour committed by him when he was in his Office. *Pract.*

30 The Office and Duty of Sheriffs, &c.

Pract. Reg. 587. Or a *Distringas nuper Vicecomiti* may issue out against him. 2 *Saund.* 88.

Pleading Removal The Form of Pleading Removal of one Sheriff, and the Election of another. *Vide* 2 *Saund.* 88.

The Sheriff's Letters Patents, The new High-Sheriff at the first County-Court next after his Election, and the Discharge of the old Sheriff, must read his Patent and Writ of *Assistance*, and nominate his Under-Sheriff, and depute and proclaim four Deputies to make *Replevins* in the Sheriff's Name, who ought not to dwell above twelve Miles distant one from the other, in every Quarter of the County one, and to make Deliverance of Distresses when Need shall require. *Per Stat.* 1 & 2 *Ph. & Mar.* c. 12. *Dalt. S. fol.* 19, 456.

His Deputies. The new Sheriff, before he shall return any Writs into the *Chancery, King's Bench, Common Pleas* or *Exchequer*, ought to make an Attorney or Deputy on Record in every of these Courts, there to receive all Manner of Writs and Warrants as shall be directed to the Sheriffs respectively, and this upon Pain of 40*l.* and that *per Stat.* 23 *H. 6.* c. 10. And such Deputies are to be made by Warrant of Attorney from the High-Sheriff. The like Law is of Sheriffs of *Wales*, and *Lancaster*, and *Chester*, and all Writs of Proclamation shall be delivered to every such Deputy. The Bishop of *Durham*, and (during the Vacancy) the Chancellor of *Durham* shall likewise have a Deputy to receive all Writs of Proclamation. 5 *Ed. 6.* 26. *Dalt. S.* 20. 456. *Sed vide* 9 *Co.* 51. *Vide plus* of Deputies *infra*.

How

*How the Sheriff's Office may be determined, or not,
before the Year be out.*

The King may determine his Office when he pleaseth, tho' he cannot (during the Continuance of his Office) abridge his Power.

The Sheriff being made a Baron of Parliament, Lord or becoming a Baron by Descent, this doth not determine his Office. *Cro. El. 12.* *Lord Mordant's Case,*

By the Death or Resignation of the King, the Authority of the Sheriff, and all his Officers, doth determine; therefore it is used presently, in the next King's Time, to sue out new Patents of his Office, and of Assistance. *Dalt. S. fol. 17. 7 Co. 30. Dyer 165. Br. Office, 25. 2 Sid. 49.*

See the Statute 3 Geo. cap. 15. § 8. That the High-Sheriff dying, &c. before his Office expires, his Under-Sheriff or Deputy-Sheriff shall continue his Office, &c. *Vide the Statute 3 Geo. post versus Finem.*

C H A P. III.

Of an Under-Sheriff, &c. His Nature and Office, and Oath. In what Cases the High-Sheriff must execute the Office in Person: He cannot abridge the Under-Sheriff's Power. Of the Sheriffs Deputies in the County, and in the Courts above. Pleadings by the Deputies, and of Rescues from him. What Bonds and Covenants between the High-Sheriff and Under-Sheriff are good or not, and the Pleadings to such Bonds. What Acts or Defaults of the Under-Sheriff, Bailiffs, Gaolers, the High-Sheriff shall be answerable for, or not: And what Actions shall be brought against the High-Sheriff, Under-Sheriffs and Gaolers. Cases and Resolutions about the Rule Respondeat superior. Where the Lords of a Franchise shall be answerable. Of Trial by the Sheriff's Certificate, or by the Record.

Deputy.
3 Bulstr.
77, 78.
Phelps and
Winch-
comb.

WE have seen before, how that an Earl had the Jurisdiction of the Counties, and their Commission ran thus; *Commissimus vobis Custodiam, Comitatus nostri ad voluntatem, or ad vitam*, and the Sheriff comes in his Place: And all Sheriffs likewise have their Commissions *ad voluntatem nostram*; and tho' there is no Mention in his Patent of any Deputy to be made by him, yet he makes one. And as in the first Government the Earl made his Deputy, so the Sheriff made his Deputy, (*viz.*) the Under-Sheriffs and Bailiffs Errants within the County, called the *Serjeants* of the County; and there is no Warrant for him so to do; tho' yet the same hath been always done.

Ministerial Officers may make Deputies.

A Ministerial Officer, as the Sheriff is, may make a Deputy; but a judicial Officer cannot, because he is to do Justice. *Sed distinguendum est.*

All

All Returns made by him, ought to be made in the Name of the principal Officer. For the High-Sheriff only is sworn as to the Execution of the Office of Sheriff, and he is to answer all. But where the High-Sheriff is made a Judge of the Cause, it's said he cannot make a Deputy. *Dalt. Oath, post. S. fol. 3.*

It's said *Subvicecomes* is a Person the Law takes Notice of, and that an Under-Sheriff hath been in Use before the Conquest; but the Under-Sheriff hath not, nor ought to have any Estate or Interest in the Office it self, neither may he do any Thing in his own Name, but only in the Name of the High-Sheriff, who is answerable for him. *Vide Latch. 187. 9 Co. 49. Dalt. Sh. fo. 3.*

In ancient Time this Office was called *Seneschal* *His Ap-
lus Vicecomitis*, and in Stat. of *Westm. 2. cap. 39.* (made Anno 13 Ed. 1.) he is called *Subvicecomes*. And in Statute 11 H. 7. cap. 15. he is called, *The Shire-Clerk. 9 Co. 49. or, The Clerk of the County. Dyer 355. Vide 4 Co. Mitton's Case.* And yet the Word *Shire-Clerk* is sometimes taken to be the Under-Sheriff, and sometimes it is used for a Clerk in the County-Court, Deputy to the Under-Sheriff. *Dalt. S. 455.*

Now an Under-Sheriff being in Effect but the Sheriff's Deputy, according to the Nature of a Deputation, he is removeable as an Attorney is; and if the Sheriff make him irrevocable, yet he may revoke him. He is but in the Nature of a general Bailiff Errant to the Sheriff, and the whole Shire, as others are over the Hundred. So that the High-Sheriff may grant this Office at Will, or he need not make an Under-Sheriff at all, but may exercise it himself. *Vide 20 H. 7. fol. 12 b. Dalt. Sh. fol. 456, 515. inter Norton and Sims.*

See now
the Un-
der-She-
riff's

Oath, post.

his Anti-
quity.
He must
act in the
High-
Sheriff's
Name.

His Ap-
pellations
in ancient
Times.

The Na-
ture of an
Under-
Sheriff.

He is not
of Necess-
ary.

The Under-Sheriff's Oath.

Every Under-Sheriff, before he meddles with his Office, shall before one of the *Justices of Assize*, or the *Custos Rotulorum* of the County, or two *Justices of the Peace* there, one whereof to be of the *Quorum*, take the Oath of Supremacy, and also the Oath of Office hereafter written, on Pain to forfeit treble Damages to the Party grieved, if he commit any Act contrary to the said Oaths, or either of them. The Form of the Oath of Office is thus.

Stat. 27
El. c. 12.

See the
Stat. 3
Geo. c. 15.
§. 20.
Where a
new Oath
is ap-
pointed
instead of
this.

I A. B. *shall not use, nor exercise the Office of Under-Sheriff corruptly, during the Time that I shall remain therein; neither shall or will accept, receive or take by any Colour, Means or Device whatsoever, or consent to the Taking of any Manner of Fee or Reward of any Person or Persons for the Impanelling or Returning of any Inquest, Jury or Tales, in any Court of Record for the King, or betwixt Party and Party, above two Shillings, or the Value thereof, or such Fees as are allowed and appointed for the same by the Laws and Statutes of this Realm: But will, according to my Power, truly and indifferently, with convenient Speed, impanel all Jurors. and return all such Writ or Writs touching the same, as shall appertain to be done by my Duty or Office, during the Time that I shall remain in the same Office.*

So help me God.

Bailiffs of
Franchises and
Sheriffs
Deputies
to take
the same
Oath.

No Bailiff of Franchise, Deputy or Clerk of a Sheriff or Under-Sheriff, shall intermeddle with their several Offices before they have taken the said Oaths, as aforesaid, (before the Persons appointed by this Act to administer the same) or before the Head-

Head-Officer of the Place, if it be a Town Corporate altering only the Terms of the Office, and the Office of Under-Sheriff, to such Words as are convenient for the Deputation, Office or Place respectively: And this on Pain to forfeit 40*l.* between the Queen and the Prosecutor.

The Forfeitures may be sued by Debt, Bill, ^{Forfeitures how to be recovered,} Plaint or Information, in any the Queen's Courts of Record: And Justices of Assize, and of the Peace, in their open Sessions shall hear and determine the Default done contrary to this Act, and on Conviction to award Execution by *Fieri fac'*, *Attachm'*, *Capias* or *Exigent'*. This Act not to extend to Fees of Executions within Cities or Corporations.

The Sheriff, in making an *Under-Sheriff*, doth implicitly give him Power to execute all the ordinary Offices of the Sheriff himself that he be transferred by Law; as serving Process, Executions, and the like. *Dalt.* 514.

But in some Cases the High-Sheriff must exercise the Office himself in Person, and the Under-Sheriff may not do it. As, ^{In what Cases the High-Sheriff must execute the Office in}

On a Writ of *Partition*.

On a Writ of *Redisseisin*; for in that the Sheriff is Judge. ^{must execute the Office in}

In a Writ of *Waste*; for there the Sheriff is ^{Person.} commanded to go to the Place wasted. *Vide infra.*

In *Justicies*, the Sheriff himself is Judge, or else all is *coram non Judice*, and the Under-Sheriff cannot hold Plea in it.

In all Cases where the Words of the Writ are, ^{One Person may be Judge and Officer in diversis respectibus} That the Sheriff shall go in his own Person; as in an *Accedas ad Curiam*, *Waste*, *Redisseisin*; there the *Under-Sheriff* cannot do it. And one may be Judge and Officer in *diversis respectibus*. As the Sheriffs in *Redisseisin*, *Waste*, &c. so Bailiffs in many ancient Corporations are Judges and Officers too, and the Custom is good. *Cro. Car.* 138. *Crane's Case*.

The Office' and Duty of Sheriffs, &c.

Note, That if a Sheriff hath a Court by Prescription, and hath used to execute Proceſs himſelf, no Action lies againſt him, becauſe he does it as Judge. *Mich. 8 Jac. B. per Cur.*

But if an Eſcheator returns a falſe Office, contrary to what was found by the Jury in Prejudice of the Party, an Action lies; for he is not a Judge, but an Officer in this. *Fitz. Aſſ. ſur le Caſe, 6. 2 Vent. 26. Palm. 143.*

Partition. A Writ of Partition was awarded, and upon the Examination of the *Under-Sheriff*, he confeſſed the *High-Sheriff* was not there as he ought to have been; and a new Writ was awarded.

Exception that the Sheriff was not there in Perſon, when to be taken. Now in the Writs aforeſaid, where the Sheriff muſt do Execution in his own Perſon, if he be not there in Perſon; if Exception be taken at the Bar before the Return of them be received, the Writ ſhall not be received: But if the Sheriff in ſuch Writs returneth, *That he was there in proper Perſon*, and this Return be received, and the Writ filed, then the Court cannot examine it; for the Return is good, and the Party can have no Averment againſt the Return, nor can have any Error. *Cro. El. Clay's Caſe. Hob. p. 13.*

High-Sheriff may not abridge the Under-Sheriff's Power. But all the ordinary Offices of the Sheriff, are transferred to the Under-Sheriff; and therefore if a Sheriff will make an Under-Sheriff, provided that he ſhould not ſerve Executions above 20 *l.* without his ſpecial Warrant, this *Proviſo* is void. For tho' the High-Sheriff may chuſe not to make an Under-Sheriff at all, or may make him at Will, and ſo remove him wholly, yet he cannot leave him an Under-Sheriff, and yet abridge his Power, no more than the King can in the Caſe of the Sheriff himſelf. Nor can the Under-Sheriff reſtrain himſelf by Covenant; as he being Under-Sheriff, is liable to execute all Proceſs; and he hath Power to do all that the Sheriff can transfer. *Hob. p. 13.* And ſo

Norton and Sims.

was

was the Case of *Boucher and Wiseman*. Cro. El. 440. In the Indenture between the High-Sheriff and Under-Sheriff was an Exception, *That the Under-Sheriff shall not intermeddle with the Execution of any Writ above the Sum of 40l.* And per Cur', this Exception was repugnant and void.

Under-Sheriff's Deputies.

The Under-Sheriff ought always to have a Deputy attendant in every of the Courts of *Westminster-Hall*, to receive and execute their Commands, and to give Account of Businesses which may fall out about the Sheriff and his Office, and ought to file a Warrant of Attorney for his High-Sheriff in every one of the Courts of *Westminster-Hall*, by an Attorney of each Court, otherwise an Action upon the Statute lies against his High-Sheriff for such Neglect. *Pract. Reg.* 587, 588.

Under-Sheriff's Care to have Deputies in Court, and to file Warrants of Att. for his High-Sheriff.

In Case the Plaintiff declares, he sued J. S. on a *Latitat* directed to the Sheriff of D. and J. S. was arrested; and the Defendant pretending to be Deputy to the Sheriff, took Bond of him, and let him at large. The Defendant pleads, the Sheriff made him his Deputy to bail all Prisoners bailable in the County, and thereupon he took Bond of J. S. and delivered it to the Sheriff, &c. The Plaintiff demurs, because he pleads his Deputation without Deed; per *Gawdy* it is good without Deed; for a Deputy doth Things only as a Servant, and in Right of his Master, and so may be without Deed. *Cro. El. Clecock and Dennis.* 21 H. 7. fol. 37. a.

In Rescue, the Bailiff of a Liberty arrested the Party, and delivered him to the Sheriff's Deputy, and saith not, from the Sheriff; yet it is good: For in an *Action on the Case* he shall shew the Truth, as it is *in rei veritate*. *Cro. Jac.* 242. *Kent and Ellicot.*

Rescue from the Sheriff's Deputy.

38 The Office and Duty of Sheriffs, &c.

The Deputy shall plead the General Issue, as the Officer himself, by the Statute 7 Jac. Moor Deputies p. 894. n. 1141. *Vide Pract. Reg.* 230. how the Deputies. Law takes Notice of the Sheriff's Deputies, but not of Deputies Deputies. And by 1 Keb. 357. pl. 48. &c. Any Clerk of the Sheriff's Appointment is so to return *Tales*.

What Bonds and Covenants between the High-Sheriff and Under-Sheriff are good.

Hob. p. 13. Covenant by the Under-Sheriff, That he will not execute any *Extent*, *Liberate*, *Elegit* or other Execution above the Sum of 40 l. is void. *Vide supra*.

Where some Covenants are good, and where not. Covenants between the High-Sheriff, some are good and some are void; for those that are good, the Bond for Performance of Covenants shall stand good. *Aliter* upon a Statute, as 23 H. 6. cap. 10. If the Sheriff will take a Bond for a Point against that Law, and also for a due Debt, the whole Bond is void. Hob. p. 13. Norton and Sims. 14 H. 8. c. 5. Dalt. 514.

Bond for discharge of all Escapes. A Bond made by the Under-Sheriff to the Sheriff, for Discharge of all Escapes, is good: For since he transfers his Authority to him, it's reasonable he should take Security of him to perform. 1 Brownl. 83. Dalt. 515.

Pleading by Under-Sheriff's Bailiff. Under-Sheriff brought Debt against one of his Bailiffs on Bond to save harmless in executing Process &c. and assigns the Breach, That the Bailiff had not executed such his Warrant sent to him upon a Process directed to him out of the *Exchequer*, to levy Issues upon certain Lands. Defendant demurs, (1.) Because the Warrant directed to him, was made out of the County. (2.) It is not alledged, That the Manor of *A*. where he was by the Warrant to levy the Issues, is within the Hundred where the Bailiff had Jurisdiction: *Per Cur'*, it is a good

Ch. 3. Bonds between High-Sheriff, &c. 39

good Exception, and the Breach is not shewed to be within the Condition of the Obligation; because a Bailiff cannot execute a Precept out of the Hundred where he is Bailiff. *Stile p. 18. Slaughter and Day.*

High-Sheriff brought Action of Covenant against Escape, the Under-Sheriff, and alledged, he was a Sheriff tho' after *Anno 1658.* and that one *W.* was then taken, and suffered to escape out of his Custody; whereupon *J. S.* recovered against him, and therein it was alledged, That the Plaintiff, *12 Car. 2.* suffered him to escape out of his Custody; it is well enough: And any Escape, tho' after the Year, would be a Breach of Covenant. *2 Keb. 352. Gremer and Humberston.*

The High-Sheriff brought an Action against the Under-Sheriff, who pleaded, he saved the High-Sheriff harmless. Plaintiff demurred, and the Plea adjudged ill; for he may save him harmless in many Things, and yet the Plaintiff may be damnified in some other; he ought to have pleaded *non dampnificatus.* *Stile P. 23 Car. 1. fo. 16. int' Wroth and Elsey.*

If any Sheriff take Hire, Gift or Bribe of any Sheriff Under-Sheriff, Bailiff, Keeper of the Gaol, &c. taking for his Place or Office, he may be indicted, fined or imprisoned. *Art. super Chart. c. 13. 2 Inst. 566.*

In Debt on an Obligation to perform Covenants, on Oyer it appeared that the Plaintiff was Under-Sheriff, Sheriff by Purchase, and so void. *Per 5 Ed. 6. c. 8.*

Vide plus infra sub hoc Titulo.

40 The Office and Duty of Sheriffs, &c.

What Acts of the Under-Sheriff, Bailiffs, Gaoler, &c. the High-Sheriff shall be answerable for, or not; or what Action shall be brought against the Under-Sheriff or High-Sheriff.

Note.

Neglect
or Fraud.

Upon every Default in the Execution of his Office, be it by Neglect or Fraud of the Under-Sheriff, he shall answer and be amerced in the *Exchequer*; but the Sheriff shall not be imprisoned for the Act of the Under-Sheriff, nor be indicted. *Latch.* 181. *Laycock's Case.*

4 Rep. 34.
Mitton's
Case.

Per Stat. 14 Ed. 3. c. 10. the Sheriffs shall have the Custody of the Gaols of the Counties, and shall put in such Gaolers as they will answer for. The Sheriff is an immediate Officer to the Courts of the King, and shall answer for Escapes; and shall be subject to Amerciaments, if he has not the Body ready in Court.

Escape
brought
against
the Un-
der-She-
riff.
Sheriff to
answer
for insuf-
ficient
Returns.

Sir Richard Dyer's Case, Sheriff of *Huntingdon*, and his Under-Sheriff, in *Marsh* and *Astrey's Case*. The Under-Sheriff suffered one to escape, and the Action was brought against the Under-Sheriff: As if the Clerk in an Office misenter any Thing, he himself shall be punished for it, and not the Master of the Office; because he takes a Fee for it. But if a Return made by the Bailiff be insufficient, then the Sheriff himself shall be amerced. 1 *Leon. p. 146. Marsh and Astrey.* See of False Returns, &c. Chap. 9.

Actions
against
the Un-
der-She-
riff.

An Action of *Faux Imprisonment*, or other Action, may be brought against the Under-Sheriff in the *Exchequer*, altho' the High-Sheriff be Officer of the Court; for the Court takes Notice of the Under-Sheriff also.

Faux Im-
prisonment.

Faux Imprisonment against the Under-Sheriff, for detaining a Prisoner after a Release made. 1 *Roll. Abr. 539. Doyly and Jolliff. 3 Bulstr. 96, 97. Withers and Henly.*

If

If the Demandant, in a Writ of Error or *Disseisin*, deliver a Writ of *Summons* to the Under-Sheriff of the County, and after he summons a Tenant upon the Land accordingly, and notwithstanding doth not return the Writ, Action on the Case may be brought against the Under-Sheriff, if the Plaintiff will: For peradventure the Sheriff had not Notice of it, and the Under-Sheriff took Fees to execute the Writ; and it's said *falso & maliciose* for Delay of the Plaintiff, which is imbezilling it. *Hill. 32 El. B. R. Marsh and Astry. Vide 1 Leon. 146. Cro. Eliz. 175. and 2 Inst. 452.* And *Quære* if an Action lies, unless the Writ be delivered *in pleno Com. &c.* according to the Act. *Vide Cro. Eliz. 873.* for not returning a *Cap' Utl'*.

Servant of the Bailiff of a Franchise, sworn on Deputation to serve Process but of such a Sum, and he serves Process of a greater Sum *sans* Warrant, and after levied the Money, and parts with charge; it; the Bailiff shall be chargeable *Hetley p. 12.*

Latitat issues to the Sheriff of *N.* who makes his Warrant to the Bailiff of a Liberty to arrest *J. S.* the Bailiff makes his Warrant to his Deputies: The Deputies arrest him at *W.* out of the Liberty, and after bring him into the Liberty, and delivered by them to the Gaoler of the Liberty. *Per Cur'*, the Action of *Faux Imprisonment* lies not against the Gaoler, for he had done but what belonged to his Office, and is not bound to enquire whether the first Arrest be tortious, or not; and if he had been informed of it, yet if he had not been privy to the Practice, he ought to detain the Prisoner, being delivered to him by a good Warrant: For if such Information had been false, the Gaoler had been liable to an Escape, and the Prisoner is not without his Remedy, for he had a good Action against the Tortfeasors; and it seemed to *Maynard*, the Action lies against the Gaoler, be-

Not re-
turning a
Writ of
Summons.

Where
the Bailiff
of a Fran-
chise is
charge-
able.

One ar-
rested out
of the Li-
berty,
and after-
wards de-
livered to
the Gaol-
er of the
Liberty.

because he is a Servant to the Bailiff of the Liberty. But no such Thing appeared in the Record; and in Truth he was a Patent-Officer by Grant of the Lord of the Liberty. But *per Cur'*, if it had been so, this alters not the Case; for the Bailiff had made his Warrant lawful, and the sole Offence was in the Bailiffs, who executed the said lawful Warrant illegally. *Vide Jones Rep. 215. Olliet and Biffy.*

Return
amerci-
able.
False Re-
turn.

If the Under-Sheriff make a Return amerciable, there the High-Sheriff shall be amerced; for the Return is made expressly in his Name: But if it be a false Return whereupon an Action of *Disceit* lies, in that Case it may be brought against the Under-Sheriff. *Dr. & Stud. 134. c. 42. Dalt. 456.*

The Sheriff shall answer for the Misdemeanors of his Bailiff. *Dr. & Stud. 135. Dalt. 457.*

Conceal-
ment of a
Writ.

If a Warrant on a *Fieri fac'* be directed to an Under-Bailiff of a Liberty, and he levies the Debt, but conceals the Writ, nor makes any Certificate of it, *Action on the Case* lies against him; for it is a *Personal Wrong*. *Mich. 12. Jac. B. R. Bell and Catesby.*

If a *Fieri facias de bonis Ecclesiasticis* of *J. S* be directed to the Bishop of *E.* and he returns *quod nulla habet Bona Ecclesiastica*, which is false, an Action upon the Case lies against the Bishop for this false Return. *Hill. 17 & 18 Car. 2. int. Pitchard and Payton. Vide 1 Sid. 276. & 1 Keb. 947. 2 Keb. 83.*

The Dif-
ference
between
the Mi-
stake of
one Per-
son's
Goods for
another,
&c.

Fieri fac' is to levy the Goods of *Dawson*, and the Bailiff by Virtue thereof took the Goods of *Lutterel*, as the Goods of *Dawson*, Trespas well lies against the High-Sheriff. For albeit had the Under-Sheriff taken another Person, he had done wrong, and without Warrant, and the Action well lies against him; yet as to Goods, this may be done by Colour of the Warrant, and the High-Sheriff is charge-

chargeable in Trespass; and the Return of *Nulla Bona* will not alter the Case, having no Influence on *Lutterel's Goods*. By *Windham*, the High-Sheriff and Under-Sheriff are one Officer: And if an Under-Sheriff deliver *White-acre* on *Hab' fac'* possession of *Black-acre*, the High-Sheriff is chargeable; *White-acre* for *Black-acre* *aliter* of a common Servant, who is a Trespasser, if he takes one Man's Goods as another's, for which I sent. Also here is no special Warrant set forth, therefore all is the Act of the Sheriff; and the High-Sheriff may bring his Action of *Covenant* against the Under-Sheriff. *Pasch. 20 Car. 2. B. R. Cremer and Humberston.*

If a Bailiff-Errant, or Special Bailiff, arrest a Man upon a *Capias ad satisfaciendum*, and after the Prisoner rescues himself, he at whose Suit he was arrested may not have an Action on the Case upon the Escape against the Bailiff, but he ought to have it against the Sheriff; for the Bailiff is but a Servant to the Sheriff. *Mich. 32 El. B. R. Atterton and Harwood.*

The Gaoler shall answer for his Servant, who permits Escapes. *Gaoler to answer for his Servant.*

The false Return of the Sheriff shall not make the Bailiff punishable in an Action; for he is Bailiff-Errant, and a meer Servant. *Dr. & Stud. l. 2. 127.* As the Bailiff justifies per Sheriff's Warrant, Plaintiff replies, The Sheriff returned upon the Writ, *Tarde. Cro. El. 181. Parks and Mosse.* *Falsely Re- turn by Sheriff, no Prejudice to Bailiff-Errant.*

Respondeat Superior.

In all Cases of Escape, the Gaoler who has the actual Possession of the Gaol shall answer for all Escapes; but if he have not sufficient wherewithal to answer *Respondeat Superior*, i.e. He that committed the Custody of the Gaol to him. *9 Rep. 98.* *Gaoler suffers Escapes.*

Yet

The Office and Duty of Sheriffs, &c.

Yet *quare de hoc*. There is no Process directed to a Gaoler but an *Habeas Corpus*, and the Prisoners are in the Eye of the Law in the Custody of the Sheriff only; and when our Books say, *Actions of Escape* lie against Gaolers, such absolute Gaolers are intended, as Writs are directed to: Tho' I conceive an Action lies against the Sheriff or Gaoler at Election; and if the Gaoler is not sufficient, then against the Sheriff. *Vide Hardress p. 29. Wainwright and Griffith*, a Case argued, but not resolved.

Vide

How the Superior, and in what Cases, shall answer for the Inferior, or not.

Upon a
Mayor's
Commit-
ment

If a Man be sent to Prison on a *Statute Merchant* by the Mayor, before whom the Recognizance was taken; and if the Gaoler will not receive him, he shall answer for the Debt, if he have wherewith; if he have not, then he shall answer that committed him to the Gaol, as appears by the *Statute* called *Statute Merchant*. *Dr. & Stud. Lib. 2. p. 136.*

23 *H. 6. c. 10.* The Superior shall put in such for whom they will answer.

Common-
alty of
London.

The *Commonalty of London* that have the Fee, shall answer for the *Sheriffs*.

Aver-
ment of
Insuffici-
ency.

But in such Action against the *Superior* it must be averred, that the *Inferior* was insufficient: As in Debt against the Dean and Chapter of *St. Paul's*, for the Escape of the Bailiff of a Liberty lies not because it is not averred that the Bailiff was insufficient 2 *Roll. 155. Dyer 278.*

How to
declare.

Debt was brought on Escape of *Holt*, committed to the *Fleet* on Judgment. Declaration is, That the Defendant Sir *Jeremy Whitchott* was seized, and granted the Office of Warden of the *Fleet* for Three Lives to *Duckenfield*, who was sei-

seized, and by *Habeas Corpus Holt* was removed, and by *Chancery* committed to the *Fleet* in Execution; and *Duckenfield* suffered the Escape, the Defendant being Superior, and *Duckenfield* insufficient. The Court inclined, That the Superior in this Case was chargeable: But the Declaration being, That at the Time of the Lease and Commitment of the Prisoner, and at the Time of the Action, the Lessee *Duckenfield* was insufficient; and the Verdict is only, That he was only at the Time of the Lease, and of the Escape and Commitment; but Verdict not that he was insufficient at the Time of the Action, which is the Gift of the Action; and if he was sufficient at the Time of the Action, no Action lieth. And this is necessary to be found on *25 Car. 2. Westm. 2. c. 11.* and this being not found, nor *nec unquam postea* the Escape, the Conclusion being so *super totam materiam*, and the *tota materia* is not found, &c. a *Venire fac' de novo* was awarded. *Plummer & Whitchcot. Vid. Jones Rep. p. 60.*

The Duke of *Norfolk* was adjudged to answer for his Deputy. *Dyer 278.*

The Duke of *Norfolk's* Case was this: He being Marshal of *England*, and having Authority to Marshal make a Deputy, made *Gawdy* his Deputy, who was sworn in open Court; afterwards *Gawdy* licensed a Prisoner, who was in Execution, to go into *Norfolk* with a Keeper, and Debt was brought against *Gawdy* for the Escape. It was adjudged, tho' he was but Under-Marshal, and the Action brought in *Middlesex*, supposing the Escape in *Shoreditch*, and not in the County of *Surrey* where the *Marshalsea* is, that the Action did well lie.

Debt was brought against the Dean and Chapter of *St. Pauls*, for an Escape suffered by their Bailiff of a Franchise, where they had a Return of Writs. *Per Cur.* it lies not against them, but against the Bailiff, for the Writ is directed to him, *Dean and Chapter of St. Paul's Case.*

scil-

scilicet, Ballivo Libertatis, and for an ill Return the Bailiff always is fined.

Coroners. The County answers for the *Coroners*.

Escape by Gaoler. The Gaoler of the County shall not answer an Escape on Execution, but the Sheriff; and some hold, that *Respondeat Superior* is only where the inferior Officer is removable, as Gaoler to the Sheriff.

In Account. By *Wild* and others, on *W. 2. Chap. 11.* it was never intended, that *Superior* should answer in any other Case than Account.

Upon Statutes. This, as some say, is grounded on 13 *Ed. 1. c. 11.* on 1 *R. 2. c. 12.* and *Respondeat Superior* was grounded only in the King's Case at Common Law. Marshal of the *B. R.* is but a Branch of the Earl-Marshal.

Where the Lord Execution be directed to a Sheriff to make of a Franchise his Warrant to the Bailiff who does it, and after is answer. a Fugitive and not able to answer for it; the Lord of the Franchise shall answer for it, and shall be liable to answer for his Bailiff. 2 *Brownl. Rep. 50.*

Keeper of Gaol, if sufficient. He which has the keeping of the Gaol by Right or Wrong, shall be charged for the Escape of Prisoners. And if he which has the Custody of the Gaol in Fee, substitutes another under him at Will, or for Life, he, which hath the actual Possession of the Office shall be charged (by Action) for the Escape. But if they be not sufficient, *Respondeat Superior. 9 Rep. 98.*

Alit' respond. Superior.

Forfeiture, &c. See the Dangers, Forfeitures and Punishment of Sheriffs (set forth in *Dalt. of Sh. cap. 121.*) for Things done, not done, or mis-done by them or by their Officers.

Where liable to double Punishment. See also there, *cap. 122.* Where the Sheriff for his Default shall be amerced to the King, and also subject to the Action of the Party, and so twice punished for one Default.

Id. cap. 123. Where the Sheriff for his Default Liable to shall be subject to the Action, *scil.* of the Plaintiff two Actions. and Defendant.

Id. cap. 124. Where the new Sheriff shall have By him an Action against his Predecessor, for his false Return upon a *Venire fac. Jurat*, &c. 19 H. 6. 38. against Predecessor.
Bro. Aet. sur le Case, 53.

Note, That where the Gaoler was Mayor and Town-Clerk, and C. the Plaintiff declared that he affirm'd a Plaint of Debt in the Court of B. against C. and thereupon caused C. to be arrested, and that the Defendant (being the Mayor, Town-Clerk and Jaylor of B). did conspire to delay the Plaint in the said Suit, and in Peril of his said Debt, had let C. go at Large without taking any Bail, yet an Action lies, for the not taking of Bail is not the Cause of the Action, but the Conspiracy. *Mich. 31 & 32 Eliz. & 1 Leon. 189. adjudged.*

Against the Bailiffs of B. for not having the Body at the Day.

If upon a Plaint levied in the Court of B. before the Bailiffs of B. according to the Custom there, a Warrant is directed to the Under-Bailiffs to take *J. S. ita quod habeant Corpus ejus coram Ballivis ad Prox. Cur.* and the Under-Bailiffs take him and commit him to the Prison, *sub Custodia* of the Gaoler of the Prison of B. if they have him not at the Day, an Action lies against them and not against the Gaoler, for there was no Commitment to him by any lawful Authority, and that Custody the Gaoler had, was only as a Servant to the Under-Bailiffs. *Adjudged Int. Baldry & Johnson. Trin. 41. Eliz. Vide Cro. Eliz. 743.*

Against

Against the Bailiffs of a Town (being Gaolers) for an Escape.

If a Man brings an Action against J. S. before the Mayor, Bailiffs and Stewards of a Town, where the Bailiffs are the Gaolers of the Prison of the Town, and J. S. for want of Bail is committed to the Bailiffs upon mean Process, and they suffer him to go at large before Judgment and Execution; and after the Plaintiff recovers against him, the Plaintiff may have a special Action upon the Case against the Bailiffs for this Escape; for by this he is deprived of the speedy Means to have him in Execution after Judgment, the which he might have had, if he had nor been suffered to go at Large. *Hill. 4 Jac. B. R. the Bailiffs of Newcastle's Case.*

Of Trials by the Sheriff, or by Record.

By Sheriff's Certificate. Trial may be by the Certificate of the Sheriff, upon a Writ directed to him in the Case of Privilege, whether one be a Citizen or Foreigner. *Trials per Pais 9.*

Per Pais. Whether one was Sheriff such a Day or not, shall be tried *per Pais*.

By the Sheriff. If it be a Question, Whether the Sheriff made such a Return or not, it shall be tried by the Sheriff: If whether the Under-Sheriff made such a

By Under-Sheriff. Return or not, it shall be tried by the Under-Sheriff. If the Question be, Whether such an one be Sheriff or not, he being made by Letters Pa-

By the Record. tents of Record, shall be tried by the Record. As was *Smith's Case*. Error assigned, because the *Venue fac'* was returned by Sir R. S. Sheriff of *Essex*,

sex, and in *Craftino Martini* 9 Car. and then the said Sir R. S. was not Sheriff, but H. S. the Defendant in the Writ of Error saith, that Sir R. S. was Sheriff of *Essex* before the Return of the said Writ, (*viz.*) 10 No. 9 Car. by the King's Patent, *prout patet de Recordo*. Upon *Nul tiel Record* pleaded, at the Day he produced the Letters Patent in Court, whereby he was made Sheriff. It was moved, that it ought to be tried *per Pais*, whether he was Sheriff such a Day, and not by the Record of the Patent, for he might be discharged before the Day. But *per Cur.* that shall not be intended, unless it were by pleading shewn to the Court, and so Judgment was affirmed. *Vide Cro. Car.* 421. 9 Co. 31.

If it come in Issue, whether he that made the By the Array be Under-Sheriff or not; this shall be tried County. by the County, and not by the Officer. 8 H. 4. 10. 20 Br. Officer, 33.

Upon an Action in Debt, against one for exer-Action
cising the Office of Under-Sheriff for two Years for exer-
together *contra Statut.* 23 H. 6. cap. 8. the Defen-cising
dant pleaded his Privilege in Abatement as an At-Under-
torney of the *Common Pleas* to be sued by Bill, Sheriff's
and the Plaintiff *qui tam*, &c demurred to the Office.
Plea, and Judgment that the Writ should abate. *contra* 123 H. 6.
Lut. 195. &c. c. 8.

The Reporter also observes, That Persons inheritable to the Office of Sheriff at the Time of making that Act; and also such Persons who had Freehold in the Sheriff's Office at the Time of making such Act, and their Under-Sheriffs and Clerks are excepted out of the said Act; and in the Declaration it is averred, that the Defendant never had any Estate of Freehold, or any other Estate in the said Office; which he says is to no Purpose, for the Exception as to the Matter extends only to the

E

Of.

The Office and Duty of Sheriffs, &c.

Office of Sheriff, and not to the Office of Under-Sheriff: For if the Sheriff himself had Freehold in his Office, the Under-Sheriff is excepted as his Inferior Officer: But he makes a *Quare* if there need be any such Averment, for it cannot be easily presumed to be the Estate of Freehold which was in Being at the Time of making that Act, 23 H. 6. has Continuance to this Day. See the Precedents also. *Lev. Ent.* 135. &c.

C H A P. IV.

Of Bailiffs of Hundreds; their Nature, Office and Oath. The Form of the Deputation of the Bailiff of the Hundred. Of Common and Special Bailiffs, and of Promises on making Special Bailiffs, to save harmless from Escapes. Of Bailiffs of Franchises, their Nature, Power, Office; and of Returns by them. The Manner of Pleading by Bailiffs of Franchises. In what Cases the Sheriff may enter into their Liberties. Of Bailiffs of Fees, or Guildable.

Bailiffs
of Hun-
dreds, &c.

HAVING treated of High-Sheriffs, Under-Sheriffs, and their Deputies, I come now to speak of Bailiffs to the Sheriff, (*viz.*) Bailiffs Errant, or *Ballivi Itinerantes*, Bailiffs of Hundreds and Franchises, and Special Bailiffs.

The Sher-
riffs make
them, and
must an-
swer for
them.

So the
Lords of
Hundreds

The making the Bailiffs of Hundreds belongs to the Sheriff.

Also Sheriffs shall appoint such Bailiffs for whom they will answer. 14 E. 3. c. 9. and for that the Statute is General; it seemeth that he shall answer as well for an Untruth in any such Bailiff, as for an Oversight. *Dr. & Stud. fo.* 135, 136. And so shall

shall those Lords who have Hundreds and Wapentakes in Fee. See after.

But no Sheriffs Bailiff shall be Attorney in any the King's Courts during the Time he is in such Office. *Dalt.* 457. Bailiff to be no Attorney.

They are to be true and credible Persons, having sufficient Lands in the same Shire whereof to answer the King and his People, by *Stat. Westm.* 2 & 4 & 5 *Ed.* 3. & *c.* *Dalt.* 457, 458. Credible Persons.

Also the Bailiff of a Hundred shall not lease his Hundred to any other in Farm or otherwise. 9 *E.* 3 *Stat. de vic.* Not to lease to Farm.

By the Statute of 14 *Ed.* 3. Hundreds (as to the Bailiffwicks of the same) are rejoined to the Counties, and all Grants made of the Bailiffwicks of Hundreds since that Statute are void, and the making the Bailiffs thereof belongs to the Sheriff; as in *Fortescue's Case* of *Buckinghamshire*, 2 *Car.* 1. 4 *Inst.* 267 *Fortescue* had divers Hundreds granted to him for Life, in *Com' Bucks*, reserving a Rent, which the Sheriff disallowed, and put in Bailiffs of his own; and *per Curiam*, this Grant was against Law, and they belonged to the Office of Sheriff. And so, Fortescue's Case. Hundreds cannot be granted from the Sheriff.

A Patent to execute all Process within an Hundred is void.

There was a Case in 34 *Car.* 2. *B. R. Cle* and *Ireland*, which confirms this Resolution. The Sheriff of the County of *Leicest'* against the Grantee of the Hundred of *G.* in an Action on the Case; a Grant was by the King of an Hundred *pur Ans*, and on Special Verdict the Question was, If the Defendant had good Title (by such Grant) to the said Hundred to hold a Court, and constitute a Bailiff against the Will of the Sheriff, and to take the contingent and incident Fees of Leets, and Courts-Baron of the Hundreds. And *per Cur'* all the Hundreds which were not

Sir Tho. Jones, Rep. 194.

The Office and Duty of Sheriffs, &c.

before the Statute of 2 *Ed. 3. c. 12.* and 18 *Ed. 3. c. 9.* granted in Fee, by the Crown were joined to the Office of Sheriff. And Judgment was given for the Plaintiff against the Patentee.

A Sheriff's Bailiff is not an Officer of the Court, that the Court takes Notice of; and yet if a Sheriff's Bailiff misbehave himself in the Execution of his Office in the Process of the Court of *B. R.* the Court will punish him. *Pract. Reg. 122.*

The Ex-
tent.

A Bailiff of an Hundred may execute a Writ out of the Hundred where he is Bailiff, for he is Bailiff all the County over. *Quare, aliter* of a Bailiff of a Liberty. *Pract. Reg. 121.*

Not to be
prejudi-
ced by
the Non-
return &c.
of the
Sheriff.

Sheriffs Bailiffs shall not be prejudiced by the Non-return or Mis-return of the Sheriff. The Defendant (as Bailiff of an Hundred) took Goods in Execution on *Fieri fac'*, and sold them, and delivered the Money to the Sheriff; it's good, and no Trover lies against the Bailiff, for they did execute *Secundum Exigentiam Brevis.* 1 *Leon. 144. Parkes and How.*

To take
the Oath
of Alle-
giance.
3 *Keb. 561,*
552.
Le Roy ver-
sus Bents.

Sheriffs Bailiffs are to take the Oath of Allegiance, according to the Statute 27 *Eliz. c. 12. sub pœna 40 l. (viz.)* Bailiffs of Hundreds, for they should execute all Writs, and must attend Affizes and Sessions; and the Statute requires, that they have sufficient within the Hundred, (but the ordinary Bailiffs or Bum-Bailiffs need not). And the Words, (that no other Person or Persons shall intermeddle till sworn) refer to the Subject Matter, (*viz.*) such Persons as ought usually to swear as Sheriff's Officers; neither does it extend to Special Bailiffs. *Vide postea.*

The

The Form of a Deputation of the Bailiff of the Hundred, viz.

KNOW all Men by these Presents, That I W. P. Esq; High-Sheriff of the County of Y. have hereby deputed, constituted and appointed R. H. of D. in the said County, Gent. my true and lawful Bailiff and Deputy within the Hundred of G. in the North Riding of the said County of Y. To have and execute the said Office of Bailiff within the said Hundred of G. (or elsewhere within the said County of Y. as Occasion shall require it) during my Pleasure only, and no longer, and to receive and take to my Use all Fees, as well for Distresses, Attachments and Perquisites of Court and other Profits due and accustomed whatsoever to the said Bailiwick belonging or in anywise appertaining; And I do hereby warrant, ratifie and confirm whatsoever my said Bailiff shall lawfully do and execute in or about his said Office. In Witness whereof I have hereunto set my Hand and Seal of Office this 20th Day of, &c.

The Execution of all Writs, which come to the His Office, shall be done by the Bailiffs of Hundreds, ^{fice,} such as are sworn, tho' now the Use is to put in Common or Special Bailiffs. *Dalt.* 459. 9 Ed. 2.

Bailiffs of Hundreds shall attend Justices of Assize, Gaol-Delivery and Justices of Peace in every ty. of their Courts and Sessions. *Ibid.* 27 H. 8. 24.

Of Common and Special Bailiffs; what they are, and how they stand in the Eye of the Law.

Common
Bailiff.

A common Bailiff, or Bailiff Errant is one nominated and authorized by the Sheriff himself to execute Processes, &c. and such a one as is commonly called a *Bum-Bailiff*.

Special
Bailiffs.

A special Bailiff, though nominated by the Plaintiff, yet for the Time being, is the Sheriff's Officer, and his Arrest is the Arrest of the Sheriff; and if he suffer a Prisoner to escape, an Action lies against the Sheriff; and if the Prisoner makes Rescous, the Return of the Rescous shall be, That it was done to the Sheriff himself. *Jones 7 Rep. 65. Bath and Salter.*

Return
of Res-
cous.

No Oath.

The Statute of 27 *El. c. 12.* about taking the Oath that the Under-Sheriff takes, extends not to special Bailiffs. *Dalt. Sh. 458, 459. Jones Rep. 249.*

Promise
to save
harmless
from Es-
capes.

In Consideration the Bailiff will make such an one his special Bailiff, a Promise to save harmless from Escapes is good; for he is an Officer appointed by the Plaintiff, and it's no Reason the Sheriff should be at a Loss by his Appointment. And this *Assumpsit* is not within the Statute of 23 *H. 6. c. 10.* for as the Party may discharge a Prisoner in Execution, so he may foreclose himself from the Benefit, if the Prisoner escape, and this Action lies, if he brings Escape against the Sheriff. *Note, The Delivery of the Writ, and the Promise made, was to the Under-Sheriff, and not to the Sheriff himself. Cro. Eliz. 178, 271. 1 Rol. Abr. 16. inter Palmer and Smallbrooke, &c.*

Of Bailiffs of Franchises, and their Power, and Returns.

Bailiffs of Franchises or Liberties, are such as are appointed by Lords within their Liberties, to do such Offices within the Precincts of such Lordships or Liberties as the Bailiffs Errant do at large within their County. *Dalt. Sh. 459.*

Note, Bailiffs of Franchises, before they execute Their their Office, must take two Oaths, one concerning Oaths. Supremacy; the other concerning the Executing their Office. *Vide supra Tit. Under-Sheriff.*

Fines and Amerciaments for insufficient Re-Fines set turn of Writs, or other Process made by the on them. Stewards or Bailiffs of Liberties shall be set upon the Heads of such Stewards or Bailiffs, and not upon the Sheriff. *Per Statutum 27 H. 8. cap. 24. Dalt. 460, 461.*

Vide Dalt. 459, 460. That Bailiffs of Liberties How they may bail such Manner of Persons being in their Cu- may let stody, as Sheriffs may; and they may take the like to Bail. Obligations for the Appearance of such Persons by them to be bailed. *23 H. 6. cap. 10.*

And that if a Bailiff of a Franchise shall arrest How up- one by a Warrant upon a *Capias* to him direct- on a War- ed from the Sheriff, yet the Obligation (taken for rant from the Appearance of the Party) must be made to the She- riff. the Sheriff, and taken by the Bailiff in the She- riff's Name.

Vide 3 Keb. 71, 125. How a Bailiff of a Fran- Franchise chise-Hundred may waive his Franchise, and arrest Hundred. as a Sheriff's Bailiff, &c.

A Bailiff of a Franchise or Liberty is said to be Officer of an Officer by himself, and hath not to do with the himself. Sheriff. *21 H. 7. fo. 23. a. Dalt. 459.*

Yet must execute the Sheriff's Precepts. And yet it is a principal Part of his Office duly to execute all Precepts directed to him from the Sheriff, and to make due Return thereof to the Sheriff. *Crompt. 57.*

May not arrest without Warrant. Bailiff of a Franchise may not arrest a Man without a Warrant to him by the Sheriff upon the King's Writ in the Hands of the Sheriff; and he must return his Precept, and set his Name to it, but a Bailiff Itinerant need not. *Keil. fo. 86. Dalt. 459, 461.*

He must return his Warrant. If the Bailiff of a Franchise, upon the Sheriff's Warrant, shall arrest a Man, and shall not return the Warrant to the Sheriff, the Party arrested may have his Action of *Faux Imprisonment* against the Sheriff. *Dalt. Sh. 459. Keil. 87. Qu. if not against the Bailiff.*

Bailiff excused, and *Faux Imprisonment* against the Sheriff. But if the Bailiff shall make his Return to the Sheriff, That he hath arrested the Party, and hath delivered him to the Sheriff, and then the Sheriff will not return the *Capias* to the Court; here no Action of False Imprisonment will lie against the Bailiff of the Franchise, for that he hath well executed his Office and Warrant; also the Bailiff of the Franchise is to make his Return to the Sheriff, and not into the Court. *Ibid. ut supra.*

May not be an Attorney. Bailiffs of Franchises, &c. having Return of Writs, may not be Attornies in any Plea within his own Franchise. *4 H. 4. 19. Dalt. 460.*

May enjoy their Offices. They may enjoy their Offices for so long Time as the same is or shall be given unto them. *27 H. 8. 24. Dalt. 460.*

To attend Judges, &c. How they are to attend the Judges and Justices of the Peace within the Shire. *27 H. 8. 24. Dalt. 460.*

Return of Writs by Indenture. How the Returns of Writs are to be made between him and the Sheriff by Indenture. *12 Ed. 3. c. 5.* And the Penalty and Punishment of the Sheriff for changing such Return. *Dalt. 461.*

How

How he shall be amerced for insufficient Returns of Writs and other Proceſſes. 27 H. 8. c. 24. Amercements.

How he ought to impanel and return En-quests and Iſſues upon Jurors. 8 H. 6. c. 5. but not if he be Party to the Suit. Fitz. Chal. 2. and how a Man may aver againſt their falſe Returns, and insufficient Iſſues. Dalt. 462. Return of En-quests.

If the Bailiff of a Franchise ſhall take one in Execution within the Guildable, it is Error. 11 H. 4. fo. 9 Dalt. 464. If he arreſts within the Guildable.

He may not ſeiſe the Goods of any Perſon arreſted or impriſoned for Felony, before Conviction or Attainder according to Law, or that the ſame Goods be otherwiſe lawfully forfeited, upon Pain to forfeit the Double of the Goods ſo ſeiſed to the Party grieved. Of his Seizing Felon's Goods.

A Bailiff of a Liberty cannot execute a *Cap. Utlag.* and if the Party be in the Hands of the Bailiff, the Sheriff may take him; for it is a *Non omittas* in it ſelf. 3 Jac. 1. per Cur' in B. R. Cannot execute a *Cap. Utlag.*

In all Caſes where the King is Party, the Proceſſes muſt be with a *Non omittas propter aliquam Libertatem*, and there the Sheriff ſhall not ſend his Precept to the Bailiff of a Liberty, but ſhall enter himſelf *ex Officio*, as for apprehending of Felons, or any Act at the Suit of the King, ſo on an Extent on Statute-Merchant. *Vide Stat. de Mercatoribus.* Dalt. 463. Proceſſes where the King is Party.

But in other Caſes where the King is no Party, there if without a *Non omittas* the Sheriff ſhall enter a Franchise to execute the King's Proceſſes, the Execution of the Proceſſes ſhall be good; but the Lord of the Liberty ſhall have an Action againſt the Sheriff; and the Party arreſted ſhall have no Remedy. F. N. B. 95, b. Finch fo. 52. Dalt. Sh. 463. Non omittas.

If

58 The Office and Duty of Sheriffs, &c.

If Goods are distrained and impounded in a Replevin Liberty the Bailiff is to make Replevin, and deliver them; but if the Bailiff will not, or did not deliver them, after the Sheriff hath made Return of the King's Writ to him, then the Sheriff shall enter and deliver them. *Per Stat. 52 H. 3. 21 Ed. 1. 17.* and in such Cases the Sheriff's Return will not serve.

Where A Writ of Enquiry of Damages directed to the he cannot Sheriff, cannot be executed by a Bailiff of a Liberty, but by the Sheriff himself; so in *Redisseisin*, Writ of for he is both Judge and Officer there. *Hob. p. 83.* Enquiry. *Vizey and Gunstone.*

* Bailiff * One was in Prison in the Gate-house, by a of *West-* Warrant from Secretary *Coventry*, for Misdemeanors, and the Gaoler refused to charge him with a ned be- Warrant of the Sheriff of *Middlesex*, at the Plain- cause the tiff's Suit. *Per Cur'* the Gaoler cannot dispute it, the Gaoler of tho' the Court may give Leave or refuse it; and the Gate- the Bailiff of *Westminster*, on Pain of 20 *l.* was house re- fused to ordered to return the Writ. charge a Prisoner with the Sheriff of *Middlesex* his Warrant. 3 *Keb.* 479. *Britton and Griffith.*

Of other Returns by them.

Of their Return after Removal. A Bailiff who executes a Writ, and is removed before the Return, may make the Return to the Sheriff, and he over to the Court; but if he executes it not, he shall not make the Return, but the Return of *Nihil* or *non est inventus*, is to be made by the new Bailiffs. *Moor. 431. Palmer and Porter.*

Moor 402. The Sheriff returns, *Mandavi ballivo, qui mihi Atkinson. dedit Responsum quod cepit Corpus, & A. fecit Rescous.* It's a good Return. But *Mandavi Ballivo qui cepit Corpus, & A. fecit Rescous*, is not good in

Ch. 4. Their Power as to Franchises. 59

in *Redisseisin*; for therein he cannot return *Man-davi Ballivo*, &c. *Moor* 402. *Vide plus Tit. Return.*

A Man may aver against the false Returns of *Aver-Bailiffs* of Liberties, and shall recover as well a-ment a-
gainst them as against the Sheriff too, of several *Issues* returned. *Dalt.* 190, 325, 462. *Return.*

Where the Precept is made to the Sheriff by the Force Justices of Peace, to return a Jury to enquire of within a forcible Entry, and the Force is within a Liberty, the Sheriff shall direct his Precept to the Bailiff of the Liberty to return the Jury, the Bailiff must make a due Return as to Issues on Jurors, &c. *Id.* 461.

Note, The Bailiff shall never take Benefit of Where he his own Liberty. If *Capias* or *Fieri fac'* comes may not against the Bailiff, the Sheriff shall execute the take Be-
Process on him, or his Goods, within the Liberty; his Li-
and where the Bailiff of the Liberty is Party to berty.
the Suit, he shall not return the Jury, but the She-
riff. 5 *Rep.* 92.

Where and in what Cases the Sheriff may enter into a Franchise.

Wheresoever the King is a Party, as in every 5 *Rep.* 92.
Felony, or Suspicion of Felony, or otherwise in
any Action, the Sheriff *ex Officio* is to enter the
Franchise, and to execute the Process himself.
Dalt. Sh. 186.

In a Writ of Waste and *Redisseisin*, the Sheriff
must enter the Franchise, to make Enquiry, &c.
Dalt. ibid.

So where the Bailiff *nullum dedit Responsum.*
Ibid.

So to deliver a Distress. *Ibid.*

But

The Office and Duty of Sheriffs, &c.

But 'tis safest for the Sheriff, in Default of the Bailiff, to have a Writ of *Non omittas propter Libertatem*. *Ibid.* & 187. Stat. 13 Ed. 1. 39.

On Extent upon Statute-Merchant the Sheriff is to enter the Franchise. *Dalt.* 187.

*Terms
Ley.*

If the Sheriff enter on *Non omittas*, by Reason of the Bailiff's Default, and execute the Writ, the Sheriff shall warn the Bailiff of the Franchise, that he be before the Justices at the Day contained in the Writ: and if he come not, or excuse not himself, then all Writs Judicial in the same Plea shall be Writs *de Non omittas*. *Ibid.* *Dalt.*

The Sheriff in his Return, is to set down the Name of the Bailiff of the Liberty.

Pleadings by Bailiffs of Franchises.

He must
shew the
Jurisdiction
of
the Court.

Trespass for taking away a Mare: The Defendant saith, That the Taking by the Defendant (being the King's Bailiff) was by Precept out of the Court of *Pomfret*, to make Execution, &c. on *Lewari*, &c. *Per Cur'*, It's ill, because he doth not shew the Jurisdiction of the Court; and that is necessary by the Bailiff of an inferiour Court, especially because he justifies by Reason thereof, as in the Countess of *Rutland's* Case; and it must appear that the Court hath Cognizance of the Cause, *aliter* he cannot execute their Precept.

Plead
Rescue
from the
Deputy
of the
Bailiff of
a Liberty.

Action on Escape, and declares he delivered a Writ to the Sheriff of *Nottingham*, who made a Warrant to the Bailiff of the King's Liberty of *Newark* to execute it; which Warrant was delivered to one *L. Deputy* of the Lord *Burleigh*, *Ballivo Libertatis Dom' Regis Wapentagii sui de Newark*, who arrests him, and the Defendant rescued

Ch. 4. Their Power as to Franchises. 6r

rescued him out of the Custody of the said Deputy. He saith, He was rescued from the Deputy of the Bailiff of the Franchise, and does not say, From the Bailiff himself, or the Sheriff. *Per Cur'*, it's good. For in this *Action on the Case* he shall shew the Truth, as it is *rei veritate*; and it's not like the Return of *Rescues* or *Indictments*, which say, It was done to the Sheriff or Bailiff himself. It was moved for Error. Secondly, Because it is alledged, the Lord *Burleigh* was *Ballivo Libertatis Dom' Regis de Newark*, and the King cannot have any Liberties; for they are extinct when they are to come to his Hands. *Sed non allocatur*: For the King may have such Liberties by the Suppression of Abbies, (which are not extinct, but revived *per Stat. 32 H. 8.*) or by some other Ways, and it shall not be intended to be extinct, unless it be shewed.

And the Bailiff of a Liberty may well have a Deputy. *Cro. Jac. 241. Kent and Ellwis.* He may have Deputy.

Further Power of Bailiffs of Franchises, and Pleadings.

Hundreds that have *Retorn' Brevium*, are Franchises.

A Hundred that hath a Bailiff by Grant of a Franchise particular Lord, is but his Servant; and the Sheriff usually make another Bailiff to execute there. *Bailiff.*

But a Bailiff of an Hundred may waive his Franchise and arrest as Sheriff's Bailiffs, and then he may take *Obligat'* in the Name of the Sheriff also.

3 *Keb. 71. Munday and Frogate.*

A Plaint being before the Bailiffs of *Bury*, they Upon a directed a Warrant to the Under-Bailiffs to take the Warrant Party, *Ita quod habeant corpus ejus coram Ballivis* *Ita qd',*
ad prox' Cur' tenend', (tal' die.) The Under-Bailiffs *&c.*

liffs arrested him and committed him to Prison, *sub custod' Def. S. T.* The *Action on the Case* lies not against the Defendant, for the Prisoner was not committed to him by any lawful Authority; it was *Ita qd'*, but not to commit him: And the Action lies against them, if they have him not at the Day. *Cro. El. 743. Baldry and Johnson.*

Lord of
the Fran-
chise to
answer
for his
Bailiff.

If Execution be directed to a Sheriff, to make Execution within a Liberty, and the Sheriff directs his Warrant to the Bailiff, who does it, and after is a Fugitive, and not able to answer for it, the Lord of the Franchise shall answer for it, and shall be liable to answer for his Bailiff. *2 Brownl. 50.*

Bailiffs of
Fee.

There are other Sorts of Bailiffs, which are Bailiffs of Fees, and are Officers of Fee within their Jurisdiction and Precinct. And for the Execution of Process there, the Sheriff shall not write or send his Precept to these Bailiffs, as to a Bailiff of a Franchise, but as to the Bailiff of Guildable; and the Sheriff shall return his Answer, and make his Return, as if the Sheriff himself had served the Process; and the Return thereof shall be in the Name of the Sheriff, and shall not make Mention of the Bailiff of Fee: But if such Bailiff will not execute the Process, a *Non omittas* shall go out to the Sheriff. *27 Ass. 65. Bro. Process 98. Dalt. 189, 459.*

Mirror of
Just. lib. 4.

The Mirror of Justices, saith, If the Bailiff of a Franchise does not make Execution of a Return of the Sheriff, the Sheriff may enter into the Franchise, and the King shall recover the Seisin, and so that shall become Guildable, which before was enfranchised.

C H A P. V.

Of the County-Court. The Nature of it. It's Jurisdiction, as to the Sum it holds Plea of. Of the Time and Place. The Form of the Original Process. Of Execution there. Of the County-Clerk. Of Replevin. The Sheriff's Office, and Demeanour therein, and the Returns thereof, what are good, or not. Pone. Withernam. The Manner of Replevying. The Retorno habendo. Second Deliverance. Property. Pledges in Replevin. The Form of the Entry of the Plaint. The Form of the Precept in Replevin. The Form of the Bond for Security. Of Accedas ad Curiam. Recordari fac' Loquelam. Of the Writ of Justices. Of the Sheriff's Tourn, Jurisdiction and Pleadings.

Of the County-Court, &c.

THIS Court is no Court of Record, but only ^{Tis as a} a Court-Baron, and the Suitors are Judges. ^{Court-Baron.} But in a *Redisseisin* the Sheriff is Judge, by the Statute of *Merton*, cap. 3. and a Writ of *Error Aliter* uplieth of his Judgment. But as to the Proclamation on Exigents, and Process to the Outlawry, it is a ^{agents and} Court of Record. *Dalt.* 405, 407. *Finch* 116. ^{Outlawries.} See after.

The County-Court is incident to the Office of ^{Tis inci-} Sheriff, and so is the Entry of all Proceedings ^{dent to} there; and therefore if the King grant the Office ^{the Office} of Clerkship of the County-Court to *M.* and constitute *J. S.* Sheriff of the same County, it's a void ^{of Sheriff.} Patent, tho' it be granted when the Sheriffwick is ^{*Dalt.* 404. *Co. Lit.* 168.} vacant, yet the new Sheriff shall have it. And in all Writs directed to the Sheriff concerning the County-

The Office and Duty of Sheriffs, &c.

4 Rep.
Mitton's
Case.
4 Inst. 266.

County-Court, the King saith, *In Comitatu tuo*; and in Returns of Exigents made by him, he saith, *Ad Comitatum meum tenet*. In False Judgment it is said, *In pleno Comitatu tuo Recordari facias Loquelam, &c. sub sigillo tuo, &c.* Also in a Precept of Tolt, to remove a Plea out of the Court-Baron into the County-Court, it is, *Summoneas, &c. quod sit ad Comitatum meum*. And it is the Sheriff's Court, tho' the Suitors are Judges.

The Stile of the Court is,
Bucks'. *Curia prima Comitatus E. L. Mil' Vicecomitis Comitatus predicti tenet apud B. &c. Vide Dalt. lib. 414.*

By Pre-
scription
the She-
riff may
be Judge.

And the next Court, *Curia secunda*, and so forth. Though it be said commonly, that the Suitors are Judges, yet by Prescription the Sheriff may be Judge, as it was in *Car. 2.* There is a Court called *Curia Comitatus* in the County Palatine of *Durnam*, and the Sheriff is Judge: And though in the County-Court the Suitors are Judges, yet by Prescription it may be held before the Sheriff. 2 & 3 Ed. 6. c. 25. *Vide Stat. 1 Mod. Rep. 72.*

Indict-
ment
there.

As a Court-Baron by special Prescription may be held *coram Seneschallo*, so in *Norton's Case*, Indictment was brought of *Perjury* in a Plea depending in the County-Court, in *Action on the Case* for 3 l. Errors assigned were: First, It is not said how the Plea was depending, as by *Justices* or *Plaint* entred: And, Secondly, It is said, In the County-Court held *coram* the Sheriff & *Sectatoribus*, and saith not *per Consuetudinem, quæ Curia concessit*. 3 Keb. 370. *Dom' Rex and Norton.*

The Jurisdiction of the County-Court.

This Court holdeth no Suits of Charters for Holdeth Lands, or for Inheritance, or to make several Plaints ^{no Suits} upon one entire Debt, nor any Action to compel ^{of Char-} one to render an Account, though it be under 40 s. ^{ters of} because the Sheriff cannot assign Auditors, who are ^{Lands.} Judges of the Record; and the County-Court is no ^{2 Inst. 380.} Court of Record. *Vide Lev. Rep.* 201, 204.

In Trespass, the Defendant justified by Virtue ^{After Li-} of a Precept after Verdict in the County-Court to ^{berum Te-} levy 3 l. 2 s. 2 d. But for that the now Plaintiff ^{nementum} had in that Court pleaded *Liberum Tenementum* in ^{there} Justification of taking Damage-Feasant, it was ^{pleaded,} said, That by that Trial a Charge upon the Freehold is in Question; and after *Liberum Tenementum* pleaded, they had no Power to proceed in the ^{Hath no} Cause, neither directly nor collaterally; and there- ^{Power to} fore the Proceedings after such Plea, were *coram* ^{proceed.} *non Judice*, and void; and upon this Exception, Judgment was given for the Plaintiff.

Also they cannot hold Plea of any Debt due Debt. by Record.

Yet if the Debt be 40 s. or above, and the Plaintiff will acknowledge in his Declaration the Receipt of so much as to bring it within 40 s. in this Case the Plea is good: But he cannot split a ^{Id. ibid.} Debt into several Actions, and if he do, the Defendant may plead the same to the Jurisdiction of the Court; or may have a Prohibition to stay that indirect Suit, or move for Attachment against the Steward.

*In Action of *Trespass* there holden, no Force *Trespass* shall be supposed.

It holdeth no Plea of Debt or Damages to the *Justices*. Value of 40 s. or above; but by *Justices* he may. *Vide infra.*

F

Nor

Vi & armis.

Nor of any Trespass *vi & armis*, because a Fine is due therein to the King, and no Court can assess a Fine, but a Court of Record. 2 *Inst.* 311.

Time of keeping it.

It is holden once every Month upon a Day certain, the Month being computed according to 28 Days; and the Reason is, because of the Writs of *Exigents*, which must be proclaimed there. 9 *H.3. c. 3.* 2 *Ed. 6. c. 25.*

Vide Tit. Outlawries.

The Cause.

The County-Court is kept once a Month at a Day certain, because the King's Writs of *Exigents* are to be proclaimed there, and the *Exigent* is to be directed to the Sheriff in this Court, and he upon the *Exigent* doth proclaim, or call the Parties (sued in Courts above) to render their Bodies, &c.

How 'tis a Court of Record.

or else to be out of the King's Protection. And the Coroners are to sit with the Sheriff at every County-Court, there to give Judgment upon Outlawries. And as to these Matters, the County-Court is a Court of Record. But in *London* the Judgment upon *Utlaries* is given by the Recorder. *Co. Lit.* 288.

Place.

This Court may be kept at any Place within the County at the Sheriff's Pleasure, but not out of it.

Northumb.

But by *Stat. 2 E. 6. c. 25.* the Sheriff of *Northumberland* is to hold his County-Court in the Town or Castle of *Alnwick*, and in no other Place.

Sussex.

The Sheriff of *Sussex* is to hold his County-Court one Time at *Chichester*, and another Time at *Lewis*; and so *alternis vicibus*. *Vide Dalton, lib. 405.*

The Process.

The Original Process of this Court, is *Sum-* *Summons*
mons, Attachment and Distress infinite. Vide Dalt. &c.
sh. 416, 417. A *Distringas* or *County-Warrant*, is
 a Precept issuing out for a Debt under 40 s. And
 it's Form is thus:

Præcept' est Ballivo ibid', Quod Distringat F. D.
per omnia Bona & Catalla sua, quod sit ad prox'
Comitat' meum ad respondend' A. B. de placito de-
bit', &c. Teste, &c.

If on Trespass:

Præcept' est ibid', Qd' attachiat' C. D. per omnia
Bona & Catalla sua, qd' sit ad prox' Comit' meum ad
respond' E. F. de placito debiti, or Transgressionis, &c.

And the Goods or Chattels whereby the Defen- Goods at-
 dant is so attached or distrained, the Bailiff shall tached,
 keep them till the next County-Court, except and not
 the Defendant replevy the same by Two Pledges replevied
 distrainable within the County; which Pledges
 shall become Sureties, that the Defendant shall ap-
 pear at the next Court, to answer the Plaintiff
 in his Plaint: But if he do not replevy the
 Goods, and that the Defendant makes Default at
 the next Court (at the Day given him by the At-
 tachment) the Court shall award the Goods so at-
 tached to be forfeited, and shall keep the Goods so Forfeited
 forfeited.

So in Distress, which must be plevied by four Distress.
 Mainpernors.

Distress.

If the Distress be mainprized, and the Defendant makes Default of Appearance, the Court shall amerce the Defendant and his Mainpernors. And in both Cases the Defendant shall distrain again to be at the next County-Court: And the Entry is thus:

The Entry of an Alias Distress.

J. S. *opp' se versus* C. D. *de placito debiti, &c.*
& ipse non venit, & Ballivus retornavit, quod distinxit eum per unum bovem pretii 5 s. Et manucapt' per E. F. G. H. I. K. L. M. ideo in misericordia. Et sicut prius distringatur, &c.

And so Process shall be made by *Distress infinite*.

Note, For every Default of Appearance the Defendant is distrainable, till he come into Court. *Dalt. sh. 417, 418.*

Note, That the Goods attached or distrained in the County-Court (whether upon a *Justicies*, or otherwise) shall be forfeited on Default of Appearance by the Defendant, at the Day given him by the Process.

Concerning *Essoins* in this Court. *Vide Dalton, 414, 415.*

Of Execution in Court-Baron.

It has been a Question, How Execution shall be after Recovery in County-Court? Not by *Capias* is agreed, except in *Wales*, *Dalt. sh. 419, 420.*

But by *Fitzherbert, 20 b.* and *Finch, 68.* the safest Way (in this Court, and so in Hundred-Court or Court-Baron) is to have an *Executione Judicii* directed to the Sheriff, &c. and then the Sheriff may make Execution, as in a Court of Record, by *Fieri fac'*, or *Levari*. *Dalt. 420.*

If

If the Defendant doth not appear the next Court after the *Distringas* executed, then there ^{*Duces tecum* for} issues out a *Duces tecum* to cause him to appear; Non-ap- and then an *Alias*, and a *Pluries duces tecum*, and ^{pearance.} so *ad infinitum*.

The Sheriff may before any County-Court award Summons a Summons to his Bailiff, returnable within two or three Days, at his Discretion, to summon the Defendant by his Goods, to answer, &c. And if the Bailiff return *Nihil*, and the Plaintiff removes the same by *Pone* into the *Common Pleas*, the Court ^{*Pone*.} shall not grant a *Capias*. 4 *Inst.* 266.

The Sheriff, before the next Day after his Election, must depute and constitute a County-Clerk to keep the Court; and the Statute 1 *H. 5. c. 4.* prohibits such a County-Clerk to practise as an Attorney in the same Year. And this County-Clerk ^{County-Clerk.} ought to return no Plaints (except in Case of Replevins) out of Courts, but in full County *sedente Curia*; yet it is now done otherwise.

And at the Adjourning of every Court he must Adjourn- appoint a Day certain for the next Court, to the ^{ment of} Intent the Country may know at what Time to re- ^{the Court} sort thither, to hear the King's Writs of *Exigents* ^{to a Day} and Proclamations read. ^{certain.}

Concerning the Writs of *Justicies*, *vide Dalt.* *lib.* 420, &c.

Of Replevins, and the Sheriff's Office and Demeanor therein, and of the Returns. Replevins.

This being a main Branch of the Business of the County-Court, I shall treat of it, so far as concerns the Sheriff and his Office.

A Replevin may be either by Writ, or by Plaint.

Replevin
by Writ.

Pledges.

1. By
Writ.

Pone.

Withernam.

Scire fac.

2. By
Plaint.

Replevin is a Writ, and lieth where any Man distains another for Rent, &c. Then he who is distained, shall have this Writ to the Sheriff (called *Replegiari Facias*) to deliver to him the Distress, and shall find Sureties to pursue his Action; or if he pursue it not, or it be found and adjudged against him, then he that took the Distress, shall have again the Distress; and this is called the Return of the Beasts; and in such a Case lies the Writ *de Retorn' Habend'*. This is when Goods are replevied by Writ, and is at the Common Law.

This Writ is *Vicountiel*, and in Nature of a *Justicies*, in which the Viscount shall hold Plea to any Value, and is not returnable; but it may be removed into the *King's Bench* or *Common Pleas* by *Pone*: By the Plaintiff without Cause, and by the Defendant with Cause shewn in the Writ. *Co. Mag. Chart.* 339, 340. *Stat. West.* 2. c. 2.

If a Replevin be sued by Writ, and the Sheriff return, That the Cattle are not to be found, then a *Withernam* shall be awarded against the Defendant; and if a *Nihil* be returned, then an *Alias* and a *Pluries Withernam*, and thereupon an *Exigent*.

If the Defendant upon the *Retorn' Habend'* adjudged for him, cannot have Return of the Beasts; and upon the *Retorn' Habend'* the Sheriff return, That the Cattle, first taken, are dead; he may have a *Scire Fac'* against the Pledges; and upon a *Nihil* returned on that, he may have a *Scire fac'* against the Sheriff; for insufficient Pledges are no Pledges. 1 *Brownl. Rep.* 168. *Co. Lit.* 145.

Replevin by Plaint, is by Force of the Statute of *Marlbridge*, c. 21. 52 *H.* 3.

The Sheriff by Plaint made without Writ, may either by Parol or by Precept command his Bailiff to deliver the Goods or Cattle, *i. e.* to make Replevin of them. *Co. 2 Inst.* 139, 140.

When

When the Distress is taken and impounded *infra Libertates*, which have Return of Writs, the Sheriff must make a Warrant to the Bailiff of the Liberty to make Deliverance; and if he will not, the Sheriff may enter and do it. If the Distress be taken *extra Libertates*, and impounded within, the Sheriff upon Plaint made, may presently enter, and make Deliverance. *Co. Mag. Chart.* 139.

If they are impounded in a Castle or House, the Sheriff Sheriff may break it, and make Replevin, and he may cannot return, he was resisted; for he may take break the *Posse Comitat.* *Co. 2 Inst.* 105, 194. Castle, House or

If the Beasts be imparked in a Close inclosed, Close, to which had a Gate open, and the Writ comes to make Re- make Replevin, and the Owner stands at the Gate plevin. to stop him, he may break the Close to make Replevin. *2 Roll. Abr.* 565. b. 20 *H. 6.* 30.

For Necessity the Sheriff may enter a Plaint Replevin before himself, and after return it in the County-made Court, that so the Cattle may not perish. *1 Keb.* 205. presently

He may take a Plaint out of the County-Court, and make Replevin presently, and not stay till the next County-Court, which is holden from Month to Month.

Cattle being distrained for Rent or Damage The Man- Feasant, &c. The Owner of the Cattle must goner of to the County-Clerk (or some * Deputy in the Replevy- County, for the Granting of Replevins) for a Re-^{ing.} * 1 & 2 plevy, to be directed to the Bailiffs to replevy them; *P. & M.* and the Party must be bound in an Obligation to ^{cap. 12.} the Viscount to prosecute his Action against him or them that did take the Cattle, or to make Return of Bond. the same Cattle to the Distrainer, if he by Justification or Avowry do recover. And if he pursue it not, or be found against him, then he that took the Distress, shall have again the Distress, and shall have a Writ from above, *de Retorn' Ha- Retorn' bend'*, in such Case. *Habend.*

72 The Office and Duty of Sheriffs, &c.

If the Goods cannot be taken by the first Replevin, then issues forth an *Alias*, then a *Pluries*, then a *Toties*, then a *Withernam*. If the Sheriff Return. return, That he cannot replevy the Cattle because that they are eloined, (or he cannot have the View of them) for the Sheriff must make Enquiry if the Return be true; and if so, then he must make a Precept to the Bailiff in *Withernam*, *i. e.* to take as many other Cattle, and he may have an *Alias* and a *Pluries Withernam*, and so *in infinitum*, but *Withernam.* hath no other Remedy in the County, unless against the Pledges, and for Default thereof, against the Bailiff; and if he be not able, then against the Sheriff. *Vide West. 2. c. 2. Co. Lit. 145. Dalt. 432, 433.*

This Sort of Replevin may be returned out of the County into the Court of Common Pleas by *Re. fa. lo. Recordare fac' Loquelam. West. 2. c. 2.*

The Sheriff, upon a *Retorn' Habend'*, may enquire the Kinds of the Cattle, if the Count or Avowry be uncertain. 1 *Leon. 193. Rigden and Palmer.*

What is a In a Replevin, no such Beast is not a good Re-
good Re- turn; but *Averia elongata*, or *Null' venit ex Par-*
turn in *te Querentis ad monstrand' Averia. 2 Leon. 67.*
Replevin Sheriff on Replevin of Goods saith, That none
or not. came to shew him the Goods, it's a good Return.
1 *Keb. 184.* for he cannot know the Goods without shewing of the Party.

If *J. S.* sue a Replevin to the Sheriff, and
Sheriff shews him the Cattle of *J. N.* and saith, They
makes are his Cattle, and he makes Replevin of the
Replevin Cattle, he is a Trespasser to *J. N.* and the She-
of a Stran- riff may have an Action of Trespass against *J. S.*
ger, he is for his false Information: For the Sheriff at his
a Tres- Peril must take Notice whose Cattle they be;
passer. but if there be any Fraud in the Matter, he may
aver

aver that. 3 H. 7. 14 H. 4. 1 Brownl. 211.
Buckwood and Beal.

If a Man have Judgment to have a Return Writ of upon a Nonsuit in a Replevin, and the Plaintiff brings a second Deliverance, this is a *Superfedeas* of the Return; yet the Defendant in the Replevin shall have a Writ to enquire of Damages; but if he have Judgment in the second Deliverance, then it shall be returned *Irreplevisable*, and he shall recover Damages. *Hill. 43 Eliz. B. C. Goldsborough, p. 185.*

If the Sheriff doth not his Office, in such Cases, an Attachment to the Coroners lies against him. *Reg. Orig. 81. a.*

As to the Sheriff's Taking Pledges, *vide sub Titulo Pledges, & infra.*

If the Sheriff return *fugavit* in another County, or that the Bailiff of the Liberty returns *elongata*, or that he can't have the View, in all these Cases a *Withernam* shall be awarded. 1 Rep. 145. *b. Withernam.*
Ann. Mayowe's Case.

The Writ of *Withernam* ought to rehearse the Return of the Sheriff.

At Common Law a Man might have been nonsuited in Replevin, and have had new ones *in infinitum*: But *West. 2. c. 2.* restrains the Plaintiff for having any more Replevin after Nonsuit, but gives the Writ of *Second Deliverance*. *Coke 2 Inst. 240.* This Writ is a *Superfedeas* in Law to the Sheriff, that he make no Return to the Defendant on the former Nonsuit. *Coke 2 Inst. 341.* But 'tis no *Superfedeas* on a Writ of Enquiry. 1 *Salk. 95.*

Note, 'Tis said this Writ of Second Deliverance is taken away by a Statute. *Temp. Car. 2. Quare.*

In

Return
upon Pro-
cess, that
the De-
fendant
claims
Property.

In a Replevin, if the Process continue until a *Pluries* issue out of Chancery, and the Sheriff returns upon this in *B.* that the Defendant claims Property; although no Day is expressly given by this Writ to the Parties, but to the Sheriff only to excuse his Contempt for not serving the Process before, yet upon the Return of this Writ the Parties may appear and plead, (*viz.*) The Plaintiff may declare, and the Defendant may plead to it, and it shall not be erroneous, for there is no other Writ to be served after this Writ; therefore if the Parties might not plead upon this, it would be a great Mischief. So if the *Pluries* be returned *Tres Michaelis*, and nothing is done till *Paschæ* afterwards, yet at this Term the Parties may appear and plead if they will. 1 *Roll. Abr.* 581 *Gawen* and *Ludlow*.

Where
upon the
Replevin
the Claim
of Pro-
perty is
made.

Where the Defendant, when the Sheriff comes to make Replevin, claims Property, the Sheriff cannot proceed; for it is a Rule in Law, the Property ought to be tried by Writ: Therefore in that Case, where the Trial is by Plaintiff, the Plaintiff may have a Writ *de Proprietate probanda* directed to the Sheriff to try the Property; and if it be found for the Plaintiff, the Sheriff is to make Deliverance; if for the Defendant, then he can no further proceed. *Co. Lit.* 145. *b.*

And to try the Property, the Sheriff ought to take with him *Custod. Plac' Coron'*. *Dyer* 173.

In Replevin the Plaintiff claims Property, and thereupon a Writ issues to the Sheriff to try the Value. 2 *Keb.* 550. *Witherley's Case*. *Vide Dalt. Sh.* 435.

Servant
may not
claim it.

Note, That the Servant may not claim Property for his Master, nor a Stranger cannot claim Property; but the Sheriff ought to make Deliverance, notwithstanding the Servant's Claim, and

and but one Defendant may claim Property. *Dalt. ibid.* § 436.

Where one sues a Replevin, but hath not the Delivery of the Goods, and the other avoweth, and the Plaintiff sheweth the Defendant is yet possessed of the Goods, &c. and prays that the Defendant may gage Deliverance; then he shall Gage Deput in Sureties and Pledges for the Deliverance, live- and a Writ shall go forth for the Sheriff to deliver rance. them.

Where the Replevin is by Plaint, there it may be removed out of the County into the *Common Pleas* by *Recordare*, and the Sheriff hereupon is to *Recordare*. summon the other Party to be in the *Common Bench*, or *B. R.* at a Day certain; and of all this he is to make Certificate under his own Seal, and the Seals of Four Suitors of the same Court.

In Replevin the Sheriff ought to take two Sorts TwoSorts of Pledges by the Common Law, *Pledges de Pro- of Pledges sequendo*; and by the Statute, *Pledges de Retorn' in Reple- vin.* *Habend'*. *Cok. Com.* 145. b.

And note, The Sheriff must take Sureties, and not a Pawn.

Therefore where one brought a Replevin, and No Pawn. the Value of the Goods taken was 20 s. and the Bailiff took 3 l. 10 s. for Pledges and not Sureties; the Party brought an Action on the *Stat. W. 2.* and resolved that the Action lies. *Jones p. 378. Cro. Car. 446. Moyser and Gray.*

If Pledges of *Prosequendo* are not found, and Judgment given, the Process is erroneous. 9 *Rep. Hussey's Case.*

But these Pledges may be found to the Sheriff, When or in Court, at any Time before Judgment, but Pledges not after. may be found.

If

Scire fac'
against
the Sher-
riff upon
the Re-
turn of
Nihil.

Action
vers. Vic.

On a Re-
torn' ha-
bend.

Withernam.
Return.

In what
Case the
Plaintiff
shall not
have De-
liverance.

If upon the Writ to have Return of the Beasts of the Pledges, the Sheriff return *nihil*, then may the Plaintiff have a *Scire fac'* against the Sheriff, *quod reddat ei tot Averia*, or *tot Catella*; and so of a Bailiff of a Franchise. *Cok. Mag. Chart.* 340.

But as to the Pledges *de Retorno Habendo*, they are given by the Statute of *W. 2. cap. 2.* and an Action is given against the Sheriff if they are not found; but this does not make the Proceedings erroneous. *Per totam Curiam. Jones p. 439. Grosse and Boscawen.* So is *Tregoose* and *Winnel's Case*.

Pledges in Replevin on *Retorno habendo* were not taken by the Sheriff according to the Statute of *W. 2. cap. 2.* after the Plaint was removed into the Common Bench by *Recordare*; yet Pledges may be found by the Court. For the Pledges given by the Statute of *W. 2.* are only to give Remedy against the Sheriff for his Neglect, and the Pledges may be found at any Time before Judgment. *Cro. Car.* 594. *Tregoose* and *Winnell*.

If a *Withernam* be awarded for the Plaintiff of the Beasts of the Defendant, and the Sheriff returns he had taken the Beasts of the Defendant in *Withernam*; but none comes from the Plaintiff to have them. And now the Plaintiff prays a Writ to the Sheriff, to deliver the *Withernam* to him; and the Defendant prays, that the Plaintiff gage *Deliverance*, and saith, That Part of the Beasts which he took, are dead by the Default of the Plaintiff, and the Remnant he is ready to deliver. In this Case the Plaintiff shall not have Deliverance of the *Withernam* to him, but it shall remain in the Custody of the Sheriff, until a Writ issue to the Sheriff, for the Plaintiff to have Deliverance of his Beasts, and then it shall come in Debate in whose Default the Beasts are dead. 44 *Ass.* 15.

Note,

Note, If J. S. be Sheriff, and the Distress be taken by him, there the Writ or Plaint shall be in common Form, naming the Sheriff by his Christian-Name and Sirname—— *quæ J. S. cepit*, and not *quæ tu ipse cepisti*; and the Sheriff in that Case ought to make Deliverance. *C. Magna Charta 139. Reg. Orig. 81. b.*

A Declaration in Replevin was for 100 Ewes Delivery and Weathers, and it doth not appear how many by the there be of Ewes, and how many there be of Wea-^{Sheriff}thers; the Sheriff is bound to make Delivery of the ^{must be}one Sort and of the other: For the Delivery of the ^{accord-}ing to the Sheriff must be according to the Writ, &c. and the Writ. Declaration was held ill. But Ewes without Addition had been good enough, and the Sheriff must have delivered the one Sort and the other; if the Writ be for *Oves matrices*, the Sheriff cannot deliver Weathers: So if for black Horses the Sheriff cannot deliver white, but is subject to *Action on the Case*. *Allen p. 33. Moor and Clypsam.*

Vide Stat. Westm. 1. 3 Ed. 1. 17. But he ought first to demand that the Cattle or Goods be delivered to him. *5 Co. 93. Dalt. 432.*

But for a further Illustration of the Matters, see my *Treatise of Replevins*, p. 48 to 60, &c.

Of Returns.

De Pone.

The Sheriff returns, He had attached the Goods *per Plegios*; and the Form of such Return, *vide 2 Sanders 333.*

De Recordare fac' Loquelam, *Dalt. c. 72, 433.*

Retorn' sur Replevin de Retorn' habend', *ibid. c. 73.*

Retorn'

Retorn' averia elongata. Vid. le Form ibid.

Retorn', quod accessit ad locum, & visum habere non potui. Ibid. See the new Retorna Brevium.

Where the Complaint is in the County-Court, of the Taking and withholding Cattle and Goods, the Entry is thus :

Plaint.

J. *S. queritur versus J. D. de placito Captionis & injustæ Detentionis averiorum ipsius J. S. contra vad' & pleg'. Et invenit plegios tam de clamore suo prosequendo, quam de averiis suis retornand', si Dalt. 437. retorn' inde adjudicetur, (viz) J. D. & R. F.*

And the Precept of Replevin is thus :

War' ff. **A.** *B. Miles, Vic' Comitatus prædict' Ballivo meo hac vice ; et utrique eorum conjunctim & divisim, salutem. Quia W. P. invenit mihi sufficientem securitatem tam de clamore suo prosequendo, quam de averiis suis, videlicet, bove uno quem J. C. cepit & injuste detinet, ut dicitur Retorn', si Retorn' inde adjudicetur. Ideo ex parte Dom' Regis vobis & utrique vestrum conjunctim & divisim mando, quod repleg' & delib' fac. præfat' W. P. bovem suum prædict', (or averia sua prædict', if several) ; Et quod ponat' seu, &c. per vad' & salvos plegios præfat' J. C. ita qd' sit ad prox' Comitatus meum apud, &c. tenend' ad respondend' præfat' W. de placito Captionis & injustæ Detentionis bovis sui prædict'. Et qualiter, &c. mihi ad prox' Comitatus meum certificetur seu, &c. sub periculo incumbente. Dat' sub sigillo Officii mei die, &c.*

Dalt. Sh.
438.

*Per me A. B. Mil'.
Vicecom'.*

If

If this Replevin be granted by the Deputy, *Dalt. Sh.* then he must set his Name to the Replevin 438. thus :

*Per me J. A. unum Deput. dict' Vicecom',
secundum formam Statuti.*

The Sheriff or his Deputy, before this Precept made, ought to take (a Bond or Pledge) sufficient Security, *De prosequend'*, or *Retorno habendo*. The Form of it is thus :

NOberint Univerſi per preſentes
me, Will' P. de C. &c. teneri
& firmiter obligari A. B. Mil' Vic'
Com' pred' in decem libris bone, &c.
ſolvend' eidem Vicecomiti, &c. Ad
quam quidem ſolutionem, &c.

THE Condition, &c. is ſuch, That if the above-
bounden W. P. do appear at the next County-
Court to be holden at, &c. and then and there do pro-
ſecute his Action with Effect againſt J. C. for wrong-
ful taking and detaining of his Cattle, (viz. one
Gelding, &c.) as is alledged, and do alſo make
Return thereof, if Return thereof ſhall be adjudged
by Law ; and alſo do ſave and keep harmleſs and in-
dempniſied the above named Sheriff, Under-Sheriff,
and Bailiffs, for, touching and concerning the Deli-
very of the ſaid Cattle : That then this preſent Obli-
gation to be void and of none effect, or elſe the ſame
to ſtand, remain and continue in full Force and
Virtue.

If the Sheriff delivered Goods, and the Plain-Nonſuit.
tiff become Nonſuit, if the Defendant be ready
in Court to avow the Taking ; how he ſhall
make his Avowry, *Dalt. Sh. 508, &c.* And the
Sheriff muſt inquire of the Value of the Diſtreſs.

So

80 **The Office and Duty of Sheriffs, &c.**

So if there be a Judgment upon a Demurrer. *Ibid*
 & 509.

Accedas ad Curiam, Recordar' fac' Loquelim.

If false Judgment be given in any other Court-
 Baron than in the Sheriff's County-Court, then
 the Writ of *Faux Judgment* is called *Accedas ad*
Curiam. Dalt. Sh. 425.

By this Writ the Sheriff must make a Record
 of the Plea or Suit, in the Presence of the Suit-
 ors; and annex the Record so made to the
 Back of the Writ, and return and certify the
 same under Seal, and the Seals of the Four
 Suitors.

Note, Nothing but the Complaint shall be removed,
 if they be at Issue.

The Form of the Return of the *Accedas, vide.*
Wilk. and Dalton, 200.

Vide Greenwood of Courts, and Dalt. 200, 272,
556.

And *vid. Greenwood of Recordar' fac' Loquelim,*
and Dalt. 201, 242.

Return. It's a good Return, that after the Receipt of
 the Writ, and before the Return thereof, no Court
 was holden, or that the Lord would not hold the
 Court, or that the Suitors would not deliver him
 the Record.

The Form of the Return of a *Pone in Replevin,*
vide Dalt. 269.

The Form of a *Recordar' fac' Loquelim, Id.*
c. 271, 272.

The Sheriff must openly read this Writ in
 Court, and return the same under his own Seal,
 and the Seals of Four Suitors, and to summon
 the Defendant to appear at the Day of the Re-
 turn. *Idem.*

The

The Return must be, *Recordari feci Loquelam, quæ est in eodem Comitatu coram Sectatoribus Curie*, (and not *coram me.*) Id. ibid.

On this Writ he may return *Tardè*.

See the new *Retorna Brevium*, from p. 120. to 140.

The Sheriff may send an *Accedas ad Curiam* by a Servant, and need not deliver it in Person; as 3 *Keb.* 249. *Reg. Orig.* 96.

Of the Writ of Justicies.

This Writ issues out of *Chancery*, directed to the Sheriff, giving him Power to hold Plea in this Court for Actions of 40 s. or above, in *Debt*, *Detinue*, *Case*, &c. and other Actions Personal. It is so called, because it is a *Commission*, (and not an *Original*) to the Sheriff to do a Man Right and Justice; it is *Vicountiel*, and not returnable. And though it be directed to the Sheriff, yet the Suitors are Judges, and the Writ of *Faux Judg-* Return.
ment lies on their erroneous Judgment; and it requires no Return, unless the Action be removed by a Writ of *Recordare*, and then the Writ must be returned, together with the Record. *Fitzh. N. B.* 85. *Finch.* 117.

The Form is thus in Debt:

REX Vic' Surr', salutem. Præcipimus tibi qd' Justicies A. quod juste, & sine dilatione redd' B. 40 s. quos ei debet ut dicitur, sicut rationabiliter monstrare poterit, qd' ei redd' debet, ne amplius inde clamorem audiamus pro defectu Justicia, &c.

And several other Forms, *vid. Fitzh. N. B.*
per totam. 6 Co. 11.

In what
Actions.

In a *Justices*, the Plea may be holden of *Accomp*; so of *Admeasurement of Dower*, *Admeasurement of Pasture*, when a Commoner puts in more Cattle than he ought; so of a *Writ of Covenant*. *Dalt.* 520. *Finch* 118.

So *Justices de Curia claudenda*, that is, where a Man ought to inclose his Ground against his Neighbour's Ground; so of *Debt*, for Money, or other Goods, and *Detinue*: So a *Justices of Nuisance*, of *Trespass*; by *Justices of Trespass*, the Sheriff may hear and determine of the *Trespass* by an Enquest of Twelve Men according to the Order of Common Law: And the Plaintiff may count to his Damage of 20 *l.* or more. *Vide Dalt. Sh. cap.* 112.

But if it be *vi & armis*, or *contra pacem*, the Sheriff cannot determine it; therefore that is usually omitted.

The Sheriff by *Justices* may hold Plea of a Bond of 1000 Marks, &c.

Justices for 40 *l.* was held and determined before the Under-Sheriff, in the Absence of the Sheriff; and a *Writ of Faux Judgment* lies, and not a *Writ of Error*. 2 *Leon.* p. 34.

Sheriff's Tourn.

Vide Dalt. Sh. chap. 105.

The *Tourn* is a Court of Record, holden before the Sheriff *Magna Chart.* c. 17.

The Na-
ture of it.

Leet is derived out of the Sheriff's *Tourn*, and after the Grant of this derivative *Leet*, the Sheriff in his *Tourn* is not to meddle in the Reach of this *Leet*, except in case of Negligence of the *Leet*, and unless it be where the *Leet* is forfeited into the King's Hands.

If one be under no particular *Leet*, he is within the Sheriff's *Tourn*.

And

And 2 Roll. Rep. 74. the Sheriff's Tourn is the supreme Leet of the County, and Neglects of the Leet are inquirable in the Tourn.

The Stile is,

Stile.

Vis' Franc-pleg' Dom' Regis tent' apud L. coram Vicecom' in Torno suo, &c. [and not Torn' Vic' tent' die apud L.] Dalt. Sh. 391.

Or, *Cur' visus Franc' Pleg' Dom' Regis apud B. coram Vicecom' in Torno suo, [and not Tornum Vicecom' tent', &c. for Tornum nihil est nisi perambulatio.]*

The Form of a Warrant to proclaim or warn the Sheriff's Tourn. *Ibid. Dalt.*

The Tourn is incident to the Office of Sheriff. 4 Rep. 33. Mitton's Case.

The Jurisdiction is in respect of the

{ Things presentable,
Place where,
Time when, &c.

What Things are inquirable in the Sheriff's Tourn, Vide Dalt. and what not.

ca. 106.

f. 392, &c.

Nothing shall be inquired before the Sheriff in the Tourn, but Actions Popular, Common Nuisances, Affrays and Bloodshed. 4 H. 6. 10.

Affault made on a Man is not inquirable there, Assault. it being but a Tort to a particular Person, for which Trespass lies. 4 H. 6. 10.

The stopping of Water, which is a Nuisance to Nuisances, the Country People, may be inquired there, for it is popular : So of a Bridge. 4 H. 6. 10.

They may amerce for Common Nuisances ; and so may Stewards of Leets, notwithstanding the Stat. of Marlbr. c. 18.

They may inquire *de Affisa panis*, and *Cervitiæ Affisa pa-*
non observata, by Stat. Walliæ in Magna Charta.^{nis.}
46 Coke.

If he find in his Tourn, that a Person hath e-Purprestured a Purpresture in the King's Highway, he *stures* may abate it. 29 Ed. 3. 21. b. Dalt. Sh. fol. 393.

In what Cases the same that is presentable in a Franchise, &c. What is presentable in a Franchise; as Default in repairing a Cawsey is not presentable in the Tourn, because out of his Jurisdiction being in the Franchise: But if the Default be in the Lord for not repairing it, this may be presented in the Tourn, because the Franchise was first derived out of the Tourn. 10 H. 4. 4. 17 Jac. B. R. Loader and Samuell.

Vide Dalt. c. 106.

Where and what Inquisitions or Presentments taken in the Sheriff's Tourn, shall be presented to the Justices of Peace, and how they shall proceed upon them.

By the Statute of 1 Ed. 4. c. 2. the Presentments shall be by the Sheriff at the next Quarter-Sessions, and there shall be inrolled; and upon this they assess the Fines and Amercements, and shall make Process to levy it to the Use of the Sheriff. Jones 300. Griffith and Bedle. *Vide Dalt. Sh. cap. 107. fol. 399.*

Sheriff's Tourn, when and where to be kept.

By the Statute of 21 Ed. 3. c. 15. the Tourn ought to be kept *infra mensem post Festum Paschæ, & post Festum Sancti Michaelis.* 31 E. 3. cap. 13. *Vide Dalt. Sh. cap. 105. fol. 390.*

Who shall be amerced for not coming to the Sheriff's Tourn, or not.

Quare. Not a Baron; not Tenants in ancient Demesne. *Dalt. 386.*

I shall cite a Case or two as to Pleading in Actions about Amercements, for further Explication.

Tref.

Trespass for taking a Bullock. Defendant justified; because at the Sheriff's Tourn held *infra mensem Paschæ*, (*viz.*) 18 Apr. the Plaintiff was presented for not appearing at the said Tourn, being *debito modo summonitus*, and amerced by the Jury, which was assessed by Four of the Jury at 40 s. And after, at the next Sessions of the Peace, (*viz.*) 22 April it was certified and ratified by such Justices of the Peace; whereupon the Steward made a Warrant to him to levy it, and so sold it.

The Plaintiff demurs:

1. Because the Defendant doth not alledge, That the Tourn was kept *infra mensem post Festum Paschæ*, but *infra mensem Paschæ*, which may as well be before *Easter* as after. 21 Ed. 3. 15.

2. Because the Amercement is alledged to be made by the Jury, and assessed by Four of the Jurors, where it always ought to be assessed by the Court, for it is a Judicial Act, and shall be assessed by the Assessors appointed. *Lib. Intr.* 119. Assessment.

3. That the Amercement was levied by the Defendant, as Bailiff by Warrant from the Steward of the Court, where (by the Statute of 1 Ed. 4) it is appointed, That no Fine or Amercement in the Tourn shall be levied, unless it be certified at the next Sessions of the Peace by Indenture, and enrolled, and by Process made from the Justices to the Sheriff, &c. *Griffith and Bedle. Cro. Car.* 275.

Judgment for the Plaintiff.

In Trespass, the Defendant justifies for an Amercement set in the Sheriff's Tourn, and Exceptions were taken to it:

1. Because he justified by *Præcipe* to him lawfully granted, and saith not at what Place.

G 3

2. He

86 The Office and Duty of Sheriffs, &c.

2. He prescribes for a Tourn to be held, and doth not shew any, or what Estate.

Prescription by a *Que Estate*. And by *Hutton*, a Prescription for a Tourn, in an Hundred-Court, by a *Que Estate*, is naught, because it lies in Grant, and is not manurable; but he ought to have said, That the King, and all they that were seised of the said Hundred, have had, and from the Time, &c.

And *per Cur.* Except he shewed before whom the Tourn was held, it was naught; and it ought to be holden before the Sheriff. 1 *Brownl.* 198. *Darney* and *Hardington*.

Oath of *Allegiance* to be taken every Sheriff's Tourn. *C. Magna Charta* 73, 147, 148.

Hundred-Courts.

Vide supra Tit. Bailiffs.

Hundred-Court. It is derived out of the County-Court, for the Ease of the People, as the *Leet* was out of the Tourn.

The Stile is thus:

Curia E. C. Mil', Hundredi sui de B. in Comitatu B. tent', &c. coram A. B. Seneschallo ibid.

Vide Dalt. Sh. cap. 104.

Vide plus 4 Inst. 267.

And the Forms of Proceedings in this Court, *vide Wilkinson*, and 1 *Vent.* 400. to 412.

C H A P. VI.

Of the Original Process in Real Actions and Personal Actions, with the Return, as Summons, Attachment, &c. Of Mean Process, what Arrest by the Sheriff or Bailiff shall be good, or not: Of the Bailiff's shewing his Warrant: What Arrest is good as to the Time of the Arrest, before or after the Return, in respect of the Persons arrested, who are privileged or protected from Arrests or not, in regard of Persons, Courts, Debts, &c. by the Statutes 7 Annæ and 12 Georgii. Where Arrests shall be lawful or not, in respect of the Warrant. Of Warrants to Special Bailiffs or known Bailiffs: Of Pledges de Prosequendo.

Of Original Process.

LET it be observed, that regularly Writs are Writs directed to the Sheriffs or Coroners, but in how special Cases to the Plaintiff himself, or to others; ^{rected,} to the Party, as a Prohibition, *ne exeat Regnum*; ^{and to} others, as to Judges Temporal, and Ecclesiastical or ^{whom.} Civil, to Serjeants at Arms, to Mayor and Bailiffs; and where the Sheriff is Judge of the Court, a Writ which should have been directed to him, shall be directed to the Serjeants of the Mace, *i. e.* where there are such Serjeants.

The Original Process in Real Actions is a Sum-Original
mons, so in all Personal Actions except in Tres-Process in
pals, and in that there is no Summons; but At-RealActi-
tachment and Distress, in a Real Action the ons.
Sheriff shall summon the Tenant upon the Land
in Demand; but in Personal Actions the Sheriff
must summon the Defendant by his Person:

The Office and Duty of Sheriffs, &c.

Sum-
mons.

And in a *Præcipe* there ought to be two Summoners, *i. e.* two good substantial Neighbours.

If the Tenant be sufficient, he must return two common Pledges for the Plaintiff, and then the Names of the Summoners thus :

*Respons' A. B. Vic' Comit' infrascript' plegij
de prosequendo.*

§ John Doe.
§ Rich. Roe.

*Summonitores infranominati, J. S. the Defen-
dant.*

§ W. Browne.
§ J. Cook.

But if the Tenant (or Defendant) be insufficient, then the Return must be thus :

*Respons' A. B. Vic' Com' infrascript' plegij
de prosequend'.*

§ John Doe.
§ Rich. Roe.

*Infranominatus J. S. nihil habet in Balliva
mea per quod (or unde) summoniri potest,
nec est invent' in eadem.*

(If it be in any Real Action, or in any Action of Annuity, Debt, Covenant, or other Writ where Summons lieth); *vid. New Ret. Brev. 410, 411, &c.*

If in Trespass, it is thus :

*Infranominatus C. D. nihil habet in Balli-
va mea, per qd' Attachiari possit, nec est
invent' in Balliva mea.*

If

If two Defendants, name them ; if more, name the two, & *cæteri Defendentes infranominati nihil habent.*

If upon Distress, then thus :

Infranominat' A. B. nihil habet in Terris, Distress. Tenementis & Hereditamentis infra scriptis per quod ipsum distringere possum.

If the Sheriff will delay the Execution of the Writ, he may return it in two Manners.

2. *Infranominat' J. S. non invenit mihi pleg. de proseguendo ; for in all si fecerit te securum.*

The Sheriff is to take Sureties or Pledges of the Plaintiff, or else he need not execute the Writ.

2. *Istud Breve mihi deliberat' fuit, (or mihi Tarde. venit) adeo tarde, qd' illud exequi non potui propter Brevitatem temporis.*

And the Sheriff may return *tarde* in every Writ, except in an *Attachment* and in a *Capias*.

But these Returns must be true, or else the Sheriff is punishable.

Attachment is by Goods, and differs from an *Arrest* which is only of the Body of a Man. Attachment by Goods,

The Form of the Attachment is,

*Pone per vadios & salvos plegios B. qd' sit Attach-
coram, &c. ad respond' A. de placito, &c. ment.*

At-

90 **The Office and Duty of Sheriffs, &c.**

How by Pledges. Attachment may be made by Pledges as well as by Goods, (*scilicet*) by finding Pledges or Sureties to appear. The Pledges shall not be bound in any Sum, as Mainpernors are, and they shall be amerced, if he appears not.

Either way. Where the Writ is, *Pone per vadios & salvos plegios*, there, if the Sheriff find the Party, he may attach him by his Pledges; if he find him not, he may attach him by his Goods. *Fitzh. Ret. de Vic. 57.*

By the Body. For Offences against the Crown which touch Life and Member, the Attachment shall be by the Body.

If the Defendant be attached by his Goods, the Return must be,

Goods. *J. D. infranominatus, Attachiatus est per unam patellam pretij 10 d.* If of dead Things, *ad valentiam, &c. Vide new Retor. Brev. 146, 147, &c. Dalt. Sh. 208, &c.*

The Form of the Return of *Distringas*, vide *Dalton 233, 559.*

Distringas. In Debt or Trespass upon the *Distringas*, the Sheriff returned but 6 *d.* Issues, and was amerced for it.

Though the Words of the *Distringas* be *quod distring' per omnes Terras & Catalla sua in Balliva tua*, yet the Sheriff ought to distrain him but reasonably, and not according to the Words of the Writ. *Kiel. 117.*

Vide Dalt. Tit. Return of Writs, & Tit. Returna Brevium.

Mean

Mean Process.

What Arrest by the Sheriff or Bailiff shall be good and lawful or not, either as to the Manner of doing, the Time, or in Respect of the Warrant or the Persons arrested.

As to the Manner: It must be by actual Touching the Body. See 1 Salk. 79. 6 Mod. 173.

It's commonly said, a known Bailiff need not shew his Warrant, although it be demanded, nor a special Bailiff without Demand: As to London, in rant.

Mackally's Case it's said, the Serjeant need not to shew his Mace, because he is sworn and known, altho' not to the Party. 9 Rep. *Mackally's Case*, 69.

And yet in the Countess of Rutland's Case, it's held a General Arrest by a Serjeant, by shewing his Mace, and touching his Body with it, by saying, *Sir, I arrest you*, is insufficient, for he ought to shew at whose Suit, out of what Court, for what the Officer is what, and of what Return, that the Party may to say know what to do. 6 Rep. 52. *Dalt.* 110. and do.

Where the Sheriff doubting a Rescue, causeth the Serjeant of the Mace to arrest one first on an Action of 100 l. entred in London according to Custom, and after the Sheriff arrests him by *Cap. ad satisfac'*, this is unlawful, and the Serjeant was severely punished, and the Court dislik- Punished for feigned Action. ed such feigned Actions against Law. 6 Rep. 52. *Dalt.* 110.

The Sheriff must not dispute the Authority of the Court, tho' the Process be erroneous. *Vide infra*, & *Dalt.* 104, 106, 107. No disputing Process.

If the Officer comes to arrest a Man, and he fleeth, the Officer may pursue him and take him in another County, but he cannot beat him, &c. because he was not arrested: If after the Arrest of the Bailiff

Bailiff he flieth, or draws Weapon, he may. 2 Ed. 4. 7. *Dalt.* 111.

Special
Bailiff ar-
resting
J. D. in a
Strangers
House.

If a Special Bailiff, by Force of a Warrant on a *Capias* in Process, enters into the House of J. S. the Door being open, and there takes J. D. against whom the Writ is, the Process is well served as to J. D. and all Strangers: And if any Stranger rescue him, he at whose Suit he is arrested shall have Action against him. 2 *Roll. Abr.* 277. *Hodges* and *Mark's Case*.

*Dies Ju-
ridicus.*

A *Capias* was returnable on *All-Souls Day*, which is *non dies Juridicus*, which the Sheriff returned, and so let the Party go; *per Cur'*, it is a bad Return; the Writ was good, and the Detaining of the Party on it lawful, and he was commanded to bring him into Court. *Poph.* 205.

As to the Time.

Of Arrest
before
the Writ
delivered

If the Sheriff arrest a Man before a Writ to him delivered, it is a Trespass; yet in the Pleading he need not say, that the Writ was delivered. It shall be intended that the Bill of *Middlesex* was delivered to the Sheriff before the Arrest, and before the Warrant made: For the Arrest being after the Prosecution of the said Bill of *Middlesex*, and it being said in the Plea, that the Bill was prosecuted, *per quod* the Sheriff makes his Warrant, it shall be intended to be delivered to the Sheriff before the Warrant made: And if it were not so, the Plaintiff ought to have shewed it in his Special Replication; but he having demurred to it, has lost the Advantage.

Justifica-
tion.

Vide 3 *Lev. Rep.* 93. & *Lev. Ent.* 193. Defendant in Trespass justifies under a Warrant upon an Attachment out of *Chancery* to the Sheriff, &c. The Plaintiff traverses, That the Writ was delivered

livered before the Battery; Defendant rejoins, it was delivered the 27th of *May*, and before the Arrest he had no Notice but that it was delivered to the Sheriff; Plaintiff surrejoins, That before the Arrest the Writ was not delivered. The Defendant rebuts, that he had no Notice as before, and tenders Issue; and the Plaintiff demurs; and by the Chief Justice and the whole Court, Judgment was given for the Defendant.

For *first*, It is not material, if the Writ be delivered to the Sheriff before the Warrant and Arrest, so long as in Truth there is a Writ, which warrants the Whole. *Secondly*, There being a Writ, and a Warrant upon it, the Bailiff shall not be charged for executing it, for he is not Privy, neither had Notice of the Time of Delivery of it to the Sheriff, and he had tendred an Issue of the Notice which the Plaintiff had refused to accept.

Delivery not material before Arrest, so in Truth there be a Writ, &c. Notice not given to Officer.

If a *Latitat* returned *die Luna prox' post cras' Sanctæ Trinit'* (which is in the 10th of *July*) comes to the Sheriff to arrest *J. S.* he may arrest him on the said 10th of *July*. 2 *Roll. Abr.* 378. *good.* *May* and *Hoper*. So a *Capias* in Process may be executed the Day of the Return. So a *Capias ad satisfaciend'*. But

Arrest on the Day of Return

The Sheriff upon a *Capias* in Process, may not arrest the Party after the Day of the Return, and before the *quarto die post*; as if the Writ be returnable *Octab' Pur'*, which is the 9th Day of *February*, and the Sheriff arrest him on the 10th Day, the Arrest is ill; for the *quarto die post* is but a Day of Grace, and the Party may appear before that Day, if he will. 33 *H. 6.* *Siderfin* 229. *Ellis* and *Jackson*. And tho' the Sheriff may return his Writ after, yet his Office *quoad* Arresting is determined on the *Essoin-Day*, so that *Dalton*, p. 116. is not Law. 1 *Keb.* 718. *mesme Case*;

But not after, and before the *quarto die post*. Office *quoad* Arresting is determined.

An

An Arrest in the House, the Door being open at six of the Clock at Night is good enough.

Sunday. By an Act Anno 29 Car. 2. none can be arrested on *Sunday*, except for Treason, Felony or Breach of Peace. 29 Car. 2. c. 7.

When on a *Sunday*. But by a late Act 5 *Anna Reginae*, c. 9. for the better Preventing of Escapes out of the *Queen's Bench* and *Fleet Prison*; It is enacted, That it shall be lawful to apprehend and take upon the Lord's Day any Person or Persons, by Virtue of any Warrant or Warrants granted in Pursuance of this or the former Act. 1 *Ann. Sess.* 1. *Stat.* 2. c. 5.

In Respect of the Persons arrested.

As if he arrest one Person for another, and one that ought not to be arrested on the Account of Protection or Privilege.

Mistaking the Person. The Sheriff had Process against one *Adderley*, and he took one *Adderby*; if he were known by one Name or the other, it is good, *alit'* not. *Moor* 407. n. 548.

He ought at his Peril to take Notice of the Person, &c. If the Sheriff executes a *Capias*, and there is no Original to warrant it, he is excusable; but he must take Notice at his Peril of the Person and Goods that he arrests, for he is not to examine whether the Original be sued out or not: But if he arrest *J. S.* instead of *J. N.* he does it without Warrant. *Dalt.* 112.

Personating another. *Capias* against *G.* and *E. B.* affirms himself to be *G.* and is taken, yet this shall not excuse in false Imprisonment; the same Law of a *Commission of Rebellion.* *Hardr.* 323. *Thurbane's Case.*

And note, Where there are two Sheriffs, the Arrest or Neglect of one, is the Arrest or Neglect of both. 1 *Salk.* 152.

As concerning privileged or protected Persons, let us see who are privileged from Arrests or not.

Here I shall briefly say something of a *Non Omittas*; of the Office and Authority of the Sheriff on it. *Vide Dalt.* 183, 463, 464.

Stat. W. 2. c. 39 gives it: For when Bailiffs By *W. 2.* of Liberties had Return of Writs, upon a *Man-c. 39.* date to them, they would do nothing Now a Remedy is given by this *Stat.* commanding the Sheriff *qd' non omittat propter aliquam Libertatem, quin exequetur Præceptum Domini Regis. 2 Inst.* 451. And

If a Bailiff make an insufficient Return, a *Non When.* *omittas* shall be granted. *2 Rol. Rep.* 336.

Attachment is a *Non omittas* in it self, *ergo* the Sheriff may break the House to take the Person. *ment.* *1 Rep.* 18, 33. *5 Rep.* 92.

Form of Pleading *Non omittas, Cap' ad satisfaciend'*, and on *Mandavi Ballivo, Return, Arrest* and *Escape.* *Vide 2 Sand.* 98.

Pleading *Non omittas, Fieri fac'* upon *Mandavi Ballivo* returned. *1 Sand.* 304.

Peers of the Realm are privileged; so Dutches-Peers. *ses* and *Countesses* by *Discent* or *Marriage*; but as in the *Countess of Rutland's Case*, there the Sheriff was excused by the Writ, tho' it appears in that she was a *Countess.* *Co. 6 Rep.* For the Officer ought not to dispute the Authority of Officer the Court: For *Cap'* upon *Contempt*, as *Rescous*, not to dispute, &c. lies against a Peer. *Dalt.* 104. *Dy. fo.* 60. *9 spute, &c.* *Co. 68.* & *10 Co. 70* & *76.* *Finch* 103.

The Body of a Peer may be taken in Execution upon a Statute, if he had not Goods nor Lands extendible. *Dalt.* 105.

Ministers

Clergy. Ministers in the Church are privileged from Arrest. *Artic. Cler' c. 3. 1 R. 2. c. 15. 1 Maria, c. 3.* So are Ambassadors and their Domesticks and Members of Parliament. *Vide post.*

Arrest in *Westminster-Hall.* One that is not privileged from Arrest, by Reason of his Attendance upon his Business in some Court of Justice, or some other Way privileged, by some special Rule or Order of Court, may be arrested in *Westminster-Hall*, though the Court be sitting there. *Pract. Reg. 73. Vide eund. Tit. Privilege.*

King's Servant may. *Wiltshire*, Under-Sheriff, was imprisoned by the Lord Chamberlain for arresting Sir George Hastings, Servant to the King, upon a *Cap' Utlagat.* *Litt. Rep. 65. Wiltshire's Case.*

Upon a *Cap. Utl.* *Per Cur'*, He may well arrest him, for it is at the Suit of the King himself, and he is sworn to serve it. And by all the Judges of *England*, he who procured the Commitment of the Under-Sheriff ought to pay all the Charges and Expences. And it is adjudged in *1 Keb. 40.* The King's Servant is not so privileged from Arrests, but that the Sheriff ought to return his Writ, unless he shews his Privilege on the Arrest.

Queen's Servants. The Queen, or Queen Dowagers Servants are not privileged. *Sed vide postea, & 1 Lev. 152.*

Leave given. It seems they are privileged from Arrests without Leave, but that they may be outlawed. *Vide Pract. Reg. 504. Tit. Privilege.*

Where Notice ought to be to the Lord Chamberlain. In the King and *Moulton's Case*, the Court declared their Opinion to be, That none of the King's Servants in Ordinary can be arrested without Notice first given to my Lord Chamberlain, who cannot privilege any perpetually, but in convenient Time must either remove such, or make them pay their Debts; but if the Bailiffs, without Notice, do arrest any such, the Messengers of my Lord

Lord Chamberlain cannot rescue the Prisoner by Letter (the Arrest being lawful), nor by Warrant, but the Party is punishable for his Contempt, for no Man can know the King's Servant by his Face, but he may shew his Privilege on the Arrest.

They also conceived the Warrant of my Lord Chamberlain to the Messenger, to take all Persons that detain such Prisoner, is a Rescue and against Law, and is to be only against the Plaintiff that sued, for the Bailiffs had the King's Warrant to arrest, and had no Notice before the Arrest that he was the King's Servant. This was Sir George Hamilton's Case, one of the Privy Chamber. 2 Keb. 3. Pract. Reg. 70. Tit. Arrest.

His War-
rant a
Rescue.

If a Parliament-Man be arrested on Mean Proceedings, or taken in Execution, it's proper for the Parliament, when they meet, to discharge him; for in Sir Richard Temple's Case, the Justices doubted whether they could do it or not. Twisden demanded why he did not sue his Writ of Privilege out of Chancery upon the Return of his Election. Siderfin 42. 2 Keb. 3. Sir Rich. Temple's Case. Vide Dyer 60.

Clergy-Men called to the Convocation, and their Servants, have the same Privilege as Parliament-Men have. Finch 140. Dyer fo. 60. eundo, morando & redeundo. Stat. 8 H. 6. c. 1.

By the Court of Chancery one was discharged from an Arrest, being done as he came to put in his Answer. 1 Rep. in Ch. 92. & p. 22. There is a Chancery Privilege from Arrest, and Privilege in other Courts for Officers and Attornies. Vide Pract. Reg. Tit. Arrests and Privilege. Dalt. 114.

As to Protections, the 2d. Instit. pag. 56. upon Protections. Stat. 33 Ed. 1. &c. is very full. All Protections that are not legal, which appear not in the Register,

H

ster,

ster, or warranted by our Books, are expressly against the Branch of *Magna Charta*. 1 *Inst.* 131. *Nulli differemus justitiam*. As a Protection under the Great Seal granted to any Man, directed to the Sheriff, &c. commanding him that they shall not arrest him during a certain Time at such a Man's Suit, which hath Words in it, *per Prærogativam quam nolumus esse arguendam*. 2 *Inst.* 56. This Protection was adjudged to be void.

Stat. 7

Anna.

No Writs
to arrest
an Am-
bassador,
or his Do-
mesticks.

Punish-
ment of
such as
shall sue
them out,
&c.

Persons
not to be
protected
by him.

His Ser-
vants to
be regi-
stered, &c.

Note, By a late Act passed 7 *An. Reg.* it is enacted, That all Writs and Processess at any Time sued forth, whereby any Ambassador, &c. received as such by her Majesty or Domestick, or Domestick Servant of such Ambassador, may be arrested, &c. shall be deemed null and void.

That any Person suing forth any such Writ, and all Attornies, &c. and Officers executing of the same, being convicted by Confession, or by the Oath of one Witness before the Lord Chancellor, the Chief Justice of the Queen's Bench and Common Pleas, or any two of them, shall be deemed Violaters of the Laws of Nations, &c. and suffer such Pains, &c. as the Lord Chancellor, &c. shall judge fit.

But no Merchant, or other Trader within the Description of any Statutes against Bankrupts, in the Service of any such Ambassador, &c. shall have any Benefit by this Act, and no Person shall be proceeded against, for the Arresting the Servant of any Ambassador, &c. unless the Name of such Servant be first registred in the Secretary of State's Office, and transmitted to the Sheriff's of *London* and *Middlesex*, who shall hang up the same in some publick Place in their Offices, whereto all Persons may resort, and take Copies without Fee.

That

That this Act shall be allowed in all Courts of This a
this Kingdom, as a Publick Act; and all Judges, &c. Publick
are to take Notice of it, without special Pleading; Act.
and all Sheriffs, Bailiffs, &c. are to have Regard to
this Act at their Peril.

*Note also, That by the late Statute for preventing 12 Georgii.
frivolous and vexatious Arrests, 'tis enacted,*

1. That none shall be held to *special Bail*, on
any Process out of a Superior Court, where the
Cause of Action is not 10 *l.* or upwards; nor out
of an Inferior Court, where it is not 40 *s.* or up-
wards.

2. That in all such Actions under 10 *l.* or 40 *s.*
(if the Plaintiff proceeds by way of Process) he
shall not arrest the Defendant, but serve him per-
sonally within the Jurisdiction, with a Copy of
the Process.

3. That if the Defendant appears not at the
Return of the Process, or within four Days after,
the Plaintiff may (on Affidavit made and filed (*gra-
tis*) in the proper Court of such Service) enter a
common Appearance, or file common Bail for the
Defendant, and proceed thereon, as if the De-
fendant himself had done the same.

4. That where the Cause of Action is 10 *l.* or
40 *s.* or upwards, Affidavit is to be made and filed
of the Truth thereof, before some Judge or Com-
missioner of the Court whence the Process issues,
or before the Officer, who shall issue it, or his De-
puty, for which 1 *s.* only (besides Stamps) shall be
paid: And the Sum to be endorsed on the Writ
or Process, for which the Sheriff or Officer shall
take Bail, and for no more.

5. That if any Writ or Process issues for 10 *l.*
or upwards, and no such Affidavit and Indorsement
be made, the Plaintiff shall not arrest the Defen-

The Office and Duty of Sheriffs, &c.

dant ; but proceed as where the Cause of Action is under 10 *l.* or 40 *s.* *ut supra.*

6. That Judges of inferior Courts may proceed in Suits not exceeding 5 *l.* though there may be other Actions there entered, wherein the Plaintiff's Demands against the Defendant exceed the said Sum of 5 *l.*

7. That Persons convicted of Perjury, Forgery, Subornation, or Barretry, practising as Attornies or Sollicitors in any Court, the Judge thereof may on Complaint or Information examine the Matter in a summary Way in open Court ; and if it appears he has offended contrary to this Act, may cause him to be transported, &c.

8. This Act not to extend to *Scotland*, and to continue for five Years ; and thence to the End of the next Session of *Parliament.*

In respect of the Warrant, what is good or not to justify Arrest : Or where Arrest shall be lawful or justifiable by Force of a Warrant or not, and where it's good without shewing the Warrant.

Warrant to Three. A Warrant made to three *conjunctim & divisim* ; this being a Warrant for Execution of Justice, may be sufficiently executed by Two. 2 *Roll. Rep.* 137. *White* and *W. Usher.*

To Four. So a Sheriff makes a Warrant to Four, & *cuilibet eorum, quod ipsi caperent* : Two of the Four take him, it's good. *Yelv. p. 25. King* and *Hobs.*

Diversity. For Warrants of this Kind are not to be resembled to Warrants of Authority to make or take Livery.

To Two jointly. A Warrant to Two Men jointly to arrest another, either of them may do it. *Co. Litt.* 181. *Vide Cro. El.* 913. *mesme Case.*

The

The Sheriff upon a Bill of *Middlesex* makes *Misnomer* his Precept to the Bailiff of *Westminster* to arrest ^{Warrant,} *J. Ferrers, Kt. ubi revera* he was not Knight, but ^{Err.} Baronet, this was not a good Warrant; and the Deputy-Bailiff being killed by Sir *John's* Servant, Officer it was not found Murder in the Servant, because killed. his Warrant was not good; and upon the Trial he was acquitted. *Jones p. 346. The King and Ferrers.*

The Sheriffs Bailiffs cannot execute a Writ directed to the Sheriff without the Sheriff's Warrant, and if he do, he is liable to an Action.

If the Writ comes out of the *King's Bench*, then Return the Warrant must be, *Ita qd' habeam Corpus ejus in R. B. coram Dom' Rege, &c.*

If out of the *Common Pleas*, then it must be ^{In C. B.} *Ita qd' habeam Corpus ejus coram Justiciariis Dom' Regis, &c.*

Where the Warrant ought to be shewed, or not.

If three Writs of *Capias* in Process at the Suit ^{A General} of *J. S.* against *J. D.* are directed to the Sheriff, ^{Arrest up-} and the Sheriff make three Special Warrants to one ^{on Three} Special Bailiff, and he comes to *J. D.* and arrests ^{Special} him generally, without shewing him in what ^{Warrants} Action, neither is it demanded of him; but presently upon the Arrest, a Stranger rescues him; Action on the Case lies against the Stranger for all the Three, for this was an Arrest in Law upon all. *Trin. 16 Jac. Hodges and Marks.*

So if the Writs and Warrants were at the Suit ^{Rescue.} of Three several Persons, and the Bailiff arrests him generally, as before; for this is a good Arrest for all, and all shall have Actions for the Rescue. *Id. ibid.*

When to be shewn. He is not bound to shew his Warrant at first, or to shew at whose Suit it is, before he had peaceably submitted to the Arrest. *Cro. Jac. 15. Hodges's Case.*

Ought to declare at whose Suit, &c. But in the Countess of *Rutland's Case* it is holden, when the Sheriff or other Person by his Authority arrests another, he ought upon the Arrest to shew at whose Suit, out of what Court, for what Cause, and when the Process is return-

The Reason. able, to the Intent that if it be upon Execution, he may pay it, and free his Body, or agree with the Party, or put in Bail according to the Law, and to know when he should appear. This is meant after a peaceable Submission. *Cro. Reports, the Case of Hodges and Markes* thus, which is a leading Case in the Point. But when the Party makes Resistance or flieth, he need not make such Declaration. *Dalt. 110.*

Where the Officer had Warrants in his Pocket. The Bailiff who had two Warrants against one, at the Suit of *J. S.* laid his Hands on him, and having both the Warrants in his Pocket, he said, I arrest you by Force of a Warrant I have; but did not shew it him, nor had it in his Hands, nor told him at whose Suit. (This was not a Bailiff *conus.*)

Defendant ought to demand them. The Court resolved, 1. This Arrest without shewing the Warrant, and telling at whose Suit, till the other demanded, is legal.

2. This Arrest without having the Warrant in his Hand, and having both Warrants about him, is well enough, though he did not shew by which of the Warrants he arrested him. For he being under the Bailiff's Arrest, is in Custody there for all Causes, for which the Sheriff had made his Warrant against him, though the Sheriff or Bailiff do not mention any specially.

And Roll C. J. in another Case, took this Difference ; a Special Bailiff is bound to shew his Warrant to the Party whom he is to arrest, otherwise the Party arrested is not tied to obey him ; but he is not bound to shew his Warrant to a Stranger.

But a known Bailiff, *i. e.* one that is common-ly known, is not bound to shew his Warrant to any.

A sworn and known Officer (be he Sheriff, Under-Sheriff, Bailiff or Serjeant) need not shew his Warrant, yet upon the Arrest the Officer ought to declare the Contents of the Warrants, *ut supra.*

If Officer arrest a Man before he has a Warrant, and afterwards procures a Warrant, yet the first Arrest was unlawful. *Dalt.* 111.

So if the Officer do make a Warrant for Summons or Arrest, not having the Original Writ or Process warranting the same, if it appear to the Judges, they shall commit the Offender to the Gaol till he has paid 10 *l.* to the Party grieved, and 20 *l.* to the King. But a *Capias* without Original, is sufficient Warrant to the Sheriff. 43 *Eliz. cap. 6.* 1 *Jac. c. 25 Dalt.* 111, 112.

Of Pledges de Prosequendo.

The Reason of Pledges in Actions is, 1. Security for the King's Fine. 2. For the Benefit of the Defendant, if Judgment be given against the Plaintiff. Taking of Pledges is to the Intent that the Party Plaintiff shall prosecute his Suit.

The Sheriff was at Election (formerly) whether he would serve the Writ or not, if the Pledges were not found ; but now it's held, they may be found hanging the Writ: Formerly if the Plaintiff

tiff sued one unjustly, the Judges would amerce the Plaintiff grievously, till the Statute of *Moderata Misericordia* was made. 3 *Bulst.* 277. Dr. *Hussey* and *Moor. Pract. Regist.* 484.

Jeofail.

Now if no Pledges be returned, it's not aided by *Stat.* 18 *Eliz.* which aids insufficient Returns, but not no Returns; and therefore the Person against whom to have Judgment is not returned, for the Judgment ought to be against the Plaintiff and his Pledges, and so this is no Return. 1 *Roll. Rep.* 447. *But see after.*

Upon Originals.

If upon the original Writ Pledges be not returned (because the Writ commands that if Pledges be found, that then, &c. and it is to the King's Disadvantage if Pledges be not found at the Loss of his Fine) it's Error. But the Sheriff may make Replevin without Pledges finding, and it is at the Sheriff's Peril if he doth not take Pledges. *Vide supra Tit. Replevin. Cro. Car.* 594. *Tregoose* and *Winnele.*

In *B. C.* Pledges must be endorsed on the Original, though they may be filed at any Time after the Return thereof. 2 *Keb.* 299. *Hedges's Case.*

Vide plus sub titulo Replevin. *Vide supra sub titulo* *jur* Summons and Attachment.

King or Infant not to find Pledges.

Neither the King nor Infant shall find Pledges, for no Amercement shall be upon their Default; therefore it were in vain for them to find Pledges. 2 *Leon. p.* 4.

Precedent.

Scire fac' against the Sheriff for taking insufficient Pledges. The Form of the Sheriff's Returning, that he had attached the Defendant by Pledges. *Hutt. p.* 77. *Trevor* and *Michelborn.* 2 *Sand.* 333.

Nota.

Vide Dalt. Sh. 209, 273, 409, 433, 438.

4 & 5 Ann.

Sed vide late Act for Amendment of the Law, 4 & 5 *Ann. cap.* 16. That no Advantage or Exception

ception shall be taken for the Default of entring Pledges upon any Bill or Declaration.

Here it may be proper to observe some Things concerning the Disturbance made against Officers in the Execution of Proceſs iſſued by Authority of Law, *viz.*

Actions for disturbing the Proceſs of Law.

An Action of the Caſe will lie againſt him that For him- ſhall hinder, diſturb or prejudice one that hath the dring one Franchiſe or Liberty of the Execution and Return in his of Writs and Proceſs in an Hundred or other Place. *Franchiſe, &c.* *F. N. B. 95. Reg. Orig. 103, 104.*

So if a Man be diſturbed to take the Profit of his Office. *1 Cro. 548. Poph. 141.*

So againſt him that ſhall diſturb an Officer in the To attach Execution of his Office; as in the attaching and ordiſtrain diſtraining of Goods, and lieth either for the Offi- Goods. cer or Plaintiff in the Suit. *N. B. 102.*

So if one hinder an Officer in doing of Execu- From do- tion in his Office at my Suit: As where the She- ing Exe- riff ſhall come to another Man's Houſe, where cution in the Goods of the Defendant are, and the Door the Houſe of the Houſe being open, another Man, not the of a Stran- Owner of the Houſe, doth ſhut the Door, and ger, &c. keep him out: Or the Owner of the Houſe, or another Man ſhall convey away the Goods, and prevent Execution, I may have an Action againſt him.

But if a Man do ſo in his own Houſe, or to prevent the Execution of his own Goods, no Action will lie. *5 Co. 91. 1 Cro. 308, 309. Wood's Caſe. Vide poſtea.*

So if I have an Execution againſt the Goods *So of the Goods of J. S. in the Houſe of J. S. and he hath Goods in the Houſe of K. L. and of K. L.*

and the Sheriff comes to the House, and tells *K. L.* who he is, and wherefore he comes, and desires him to open the Doors to him, and he keeps him out that he cannot do Execution, I may have this Action against *K. L.* 5 Co. 93.

For conveying away the Goods to be attached, &c.

Where the Sheriff may not break open a Man's House.

So if an Officer be coming to arrest a Man, or attach his Goods at my Suit, and another Man convey away the Goods or the Person, so that the Officer cannot do this Work, I may have this Action. *F. N. B.* 102. 21 *H.* 7. 40. 18 *Ed.* 3. 3.

But it was agreed, That upon a *Ca' Sa'* the Sheriff may not break open any Man's House to make Execution, but he is punishable for it; but upon a *Capias Uilagatum* he may enter any Man's House to apprehend him; for no Place ought to protect him against the King: But whether he might upon a *Fieri facias*, or *extendi facias*, break the House of any to make Execution, was doubted; but no Doubt, if the Doors were open, he might enter, for the Law gives him Authority thereto; as an Executor may enter to take Goods left there by the Testator. 1 *Cro.* 908. *inter Seyman and Greham.*

For shutting his Door, and hindring the Sheriff to seize Goods, &c.

Which Action was brought against the Defendant for shutting his Door, and hindring the Sheriff to seize the Goods of *G. B.* in his House. And *Fenner* and *Yelverton* were of Opinion, That the Goods being in the Defendant's House, who is a Stranger to the Execution, he is not bound to take Cognizance of the Sheriff's Intent in coming to make Execution, and his shutting the Door was lawful; and altho' there was Loss to the Plaintiff, yet it was *dampnum sine injuria*: And it appeared not that the Goods of the Cognizers which were in the Defendant's House, came thither; and if they were taken by the Defendant as a Trespassor, the Party, whose Goods they

they are, or the Sheriff upon Execution may come within the House, if the Door be open, to seize them, because the Defendant had them by unlawful Means.

But if the Defendant had taken them by law-^{Aliter} ful Means, *viz.* by Bailment or otherwise, neither where the the Party himself, nor the Sheriff, can come with-^{Defen-} danntakes in the House to seize them; and therefore the in Goods shutting the Door was no Cause of Action for the by lawful Plaintiff. Means.

To this *Williams* agreed *in omnibus*, and that Where the Sheriff might not break any Man's House to the She- make Execution, unless in the Case of the King, riff may or for a Contempt; and thereupon Judgment for a House not break the Defendant. to make Executi-

Note, If the Sheriff's Officer only touches the Party against whom the Process is, with the End on. of his Finger, &c. 'tis an Arrest, and he may break open the House to take him. 6 Mod. 173. Farfl. 8.

But if the Bailiff only shew his Warrant, and pronounce the Words of Arrest without touching the Body, in that Case he cannot break the House to take him; and if he does he is a Trespassor. *ibid.* 1 Sal. 79.

Where and in what Cases the Sheriff or his Officer may break open the House, or not, see *Cro. Eliz.* 753, 908, 909. *Cro. Car.* 386, 544. *Cro. Jac.* 280, 486, 556. 5 Co. 91, &c. 7 Co. 6. 126. 9 Co. 66. 11 Co. 82. 12 Co. 131. 4 Bulstr. 146. Telv. 28. Hob. 62, 263. 2 Roll. 294. Owen 63. 1 Roll. 182. Golds. 79, 233. 4 Leon. 41. 1 Jon. 429, 430. Hard. 2. Stile 447. Moor 406. Dyer 36. Pal. 53. 1 Mod. 286. Cumberb. 17, 327, 342. 1 Salk. 79.

C H A P. VII.

Of Bail. Of special Bail. Who shall take Bail, or not. Of Bail-Bonds. Explication of 23 H. 6. c. 10. The Design of the Statute. The Form to be observed according to the Statute. What Obligations and Conditions are within the Statute, or not. In respect of the Persons and Officers to whom they are made. In respect of the Form, of the Courts, and of the Sureties. The Meaning of the Words colore Officii. Of the pleading the Statute of 23 H. 6. And when and how to be pleaded. What Appearance to a Sheriff's Bond is good, or not. Of the Sheriff's Return on taking Bail. Of insufficient Bail. Of refusing sufficient Bail; and the Remedy against the Sheriff for so doing. The Sheriff's Pleading this Statute in Actions brought against him. Of Bail-Bonds being discharged or assigned. Of other Bonds, besides Bail-Bonds, entred into to the Sheriff; As for being a true Prisoner; Saving harmless from Escapes; For Fees, &c. And the Pleadings thereunto, with all the late Cases and Resolutions relating thereunto.

Of Bail.

BA I L is so called, because the Party bailed is delivered by Law into the Custody of those that are his Bail, and who are to answer the Plaint if they do not produce the Principal to do it.

Special
Bail in
B. R. on
Latitat,
and in
B. C. on
Original.

The Cause of Marking the Roll for special Bail in the King's Bench is, because the Cause of Action does not appear upon the *Latitat*, by which the Party is arrested, but it is made appear

appear by the Declaration; but in the Common Pleas, where they proceed upon Original, the Cause of Action does appear.

Now one that is in Execution in Custody of the Marshal of the King's Bench, is not compellable to find Bail, if another Action be brought against him; but if he be in the Fleet on Execution, and an Action be brought against him in the King's Bench, he must either be removed and committed to the Custody of the Marshal, or else he must put in Bail to the Action.

Upon an Action against one in Execution in Custody of the Marshal or Fleet, &c.

It is the Common Course of London, upon Complaint before the Sheriffs, and a Precept to the Serjeant to arrest one, the Sureties shall be found and offered to the Sheriffs, not the Serjeants. So in Inferior Mayors Courts, Widow and Clark's Case.

Who shall take Bail in London.

Therefore in false Imprisonment the Defendant pleads the Custom of London, That on Entry of a Complaint in London, a Serjeant may by Parol, or otherwise, arrest the Defendant to answer the Plaintiff; and shews, That J. S. entered a Complaint in the Compter against the now Plaintiff, and that he was a Serjeant, and arrested him and carried him to the Compter till he found sufficient Bail. The Plaintiff confesseth the Custom, the Entry of the Complaint and Arrest, and that he offered Security to the Sheriff; and of this he gave Notice to the Defendant, and yet he carried him to the Compter. The Defendant demurs. *Per Cur'*, The Serjeant, upon Tender of Bail to the Sheriff, is not bound to set the Party at large, unless the Sheriff send a Warrant testifying this to him. *Cro. Car. 196. Percival and Salmon. 1 Roll. Abr. 561. & 1 Jones Rep. same Case, but the same Point does not appear, it being said the Bail was tendred to the Sheriff. Vide Gen. Abr. 682. in Margine.*

Jones Rep. 226.

See

See *Cro. Eliz.* 77. the same Point agreed, where an Arrest was upon a Plaint in the Court of *Nottingham*, and the Defendant in Gaol under Custody of the Mayor, and not of the Serjeant.

Where the Mayor is both Judge, is Gaol-
or is both Judge and Gaol-
cr. And *Cro. Eliz.* 168. it is said, That in all Corporation-Courts, the Mayor who is Judge, is Gaol-
or is both Judge and Gaol-
cr. Judge and not before the Serjeant, though alledged *secundum Consuetudinem Villæ*. But Bail for Appearance only, may be taken by the Serjeant. *Cro. Jac.* 94, 95.

Capias for the Good Behaviour. If a *Capias* for the Good Behaviour be directed to the Sheriff by the Justices of *Assize*, and upon this the Sheriff makes a Warrant to *J. S.* to take him, who took him accordingly, and the Party tenders *J. S.* sufficient Bail for his Appearance; and *J. S.* refuses it and keeps him in Custody. This makes him not a Trespasser *ab initio*; for 'tis not his Office to take Bail, but the Sheriff's. 2 *Roll. Abridgment*, 562. *Adam's Case*.

Bail for one taken by *Cap' Excom'*. Neither the Sheriff, nor any Justice of the Peace, can bail one taken by a Writ of *Cap' Excommunicat'*. But he isailable by the King's Bench. 1 *Bulstr.* 122. *Hall and King*.

Testatum. *Capias* must be taken out, and sealed and delivered to the Sheriff against the Bail, before he can be taken by a *Testatum* in another County; and because in *Robinson's Case* it was never delivered to the Sheriff, but all returned in one Term, the Execution was set aside. 2 *Keb.* 424. *Robinson's Case*.

Scire fac' against the Bail. Return. The *Scire facias* against the Bail, usually is left four Days with the Sheriff before the Return of it; but if it be not, it is well enough. 2 *Keb.* 219. *Barle and Potter*.

Judgment

Ch. 7. Of Special Bail.

III

Judgment in a *Scire facias* against Manucap-Return tors, the Bail is liable by the Judgment; and if of *Scire* they be Freeholders in the same County where *fac* a- the Recognizance is made, then they must have *gainst* the Ma- Notice and Time, because the *Scire facias* may be nuctors returned: But if they be Strangers, the Sheriff is Notice. not bound to warn them, or give Notice, but re- turn *Nilil* on both together; for this is but of Fa- vour to the Bail, who at their Peril ought to bring in the Principal.

In Action brought against the Baron and Feme, By Hus- and the Husband is only arrested, yet the Husband band for must put in Bail for his Wife, if the Name of his Wife. the Wife be in the Writ, else he is not bound to put in Bail for her; for it is the Writ that war- rants the Bail. *Pract. Reg.* 43. *Vide Cro. El.* 370. *Cro. Jac.* 445. & *1 Mod.* 8. *Stile's Rep.* 475.

Yet in *1 Keb.* 241. *inter Nevil & Cage*, the Husband is not bound to put in Special Bail for his Wife, if she be not arrested; but he must appear for himself and his Wife, and must find Special Bail for himself.

Note, Where Bail is put in *De bene esse* (as in a Bail de Judge's Chamber) the Plaintiff cannot sue the She- *bene esse*. riff's Bond till it be refused or set aside; but he ought to except against it in the Judge's Chamber. *2 Keb.* 478.

But I think he may except against it after within 20 Days a certain Time. According to an Old Rule, it was to except. within 20 Days. *Pract. Reg.* 110.

Where, how and to whom Commissions may Com- be granted to take Bail in the Country, in any missions. Action or Suits depending in the Courts at *Westmin-* ster, and how such Bail shall be justified. *Vide* 4 20 Days & 5 *W. & M.* c. 4. and hereupon 20 Days are al- to except. lowed to except.

See

The Office and Duty of Sheriffs, &c.

See also the 1st Part of *Instruct. Cleric. Tit. Bail.*

Assign-
ment of
Bail-
Bonds.

See also the late Statute for Amendment of the Law, how Bail-Bonds may be assigned to the Plaintiff.

Of Bail-Bonds.

Bail-

Bonds ta-
ken by
Stat. 23
H.6. c.10.

Note, the Statute 23 H. 6. c. 10. enacted, That Sheriffs, Coroners, &c. shall let to Bail Persons by them arrested, or in their Custody by Force of any Writ, Bill or Warrant, in any Personal Action, or because of any Indictment of Trespass upon reasonable Sureties, (having sufficient within the County) to keep their Days in such Place, &c. as the Writ, &c. require; (such as are in Ward by Condemnation, Execution, *Capias Utlagatum*, or Excommunications, Surety of Peace, or committed by Command of the Justices, and Vagabonds, refusing to serve according to the Statute of Labourers only excepted.

The Explication of the Statute of 23 H. 6.

This Statute is frequently pleaded in our Books, and many Cases about the Nature of this Statute; and the Returns and Pleadings thereupon we meet with, which if methodically digested, would be the better and more clearly explained.

Let us see how the Common Law was before the Making of this Statute.

Breve de
homine
Repleg.

At Common Law, if the Sheriff had taken any Man by the King's Writ, he must not be delivered but by *Breve de homine replegiando*, and he was not compellable to take Bail of any. 2 Sand. 60.

But

But this Statute compels him to take Bail, and To pre-
the Design of this Statute is to provide against the vent Ex-
Extortion of Sheriffs, who would not deliver them tortion.
without great Sums. *Cro. El.* 808. *Sir Geo. Clifton.*

Yet if he was in Execution, they would take And dis-
such Bonds as they pleased, and let him at large. charge
Dalt. 518. *Plowd. Com.* 67. b. out of Ex-
ecution.

Now the Statute prescribes the Form, and that
the Sheriff, under Colour of his Office, should not Design of
oppress the Party to make him any other Obligation, this Stat.
for the Statute makes the Obligation void for not
pursuing the Form, but not in the Matter thereof.
This Statute was made for the Prisoner's Benefit;
for the Mischief before was, That the Sheriff not
being compellable to bail him, would extort Mo-
ney to bail him. *Mod. Rep.* 228.

This Statute hath also three Branches, as it is in
Dive and *Manningham's Case.* *Plowden.*

1. A Commandment and Authority to the Sheriff To whom
to let to Bail such Persons as are mainpernable: So it extends
it extends to Coroners, Stewards of Franchises,
Bailiffs, Keepers of Prisons, &c.

2. A restraining Branch, That they shall not let
to Bail such Persons as be in their Ward by Con-
demnation, Execution, *Capias Utlagat'*, or Excom-
munication, Surety of the Peace, and such as shall
be committed by Special Commandment of the Ju-
stices, nor Vagabonds.

3. The third is, to make Obligations void, taken The Con-
in any other Form than the Statute limits, That no dition of
Sheriff, nor any of his Officers and Ministers afore- a Bail-
said, shall take, or cause to be taken, or make any Bond for
Obligation for any Cause aforesaid, or by Colour of Appearance.
their Office, but only to themselves, of any Person,
nor by any Person which shall be in their Ward, by
the Course of the Law; but by the Name of their
Office, and upon Condition written, That the said
Prisoners shall appear at the Day contained in the
I said

The Office and Duty of Sheriffs, &c.

said Writ, Bill or Warrant, and in such Places as the said Bill, &c. shall require: And any other Obligation taken by them in any other Form, shall be void.

Again, There are Three Forms to be observed.
Vide Dalt. 357.

Three
Forms.

Not of
one in
Executi-
on.

The Stat.
mistaken
in Print.

Marshal.

Misreci-
tal.

1. That it shall be made to the Sheriff himself.
2. Note, These Words (*For any other Cause*) refer to all that went before, as well those contained in the Exception, as in the first Branch. Therefore a Bond taken of a Man in Execution is void by this Statute, and the Surety may plead, this was taken by him in Execution as Sheriff, and the Words, *Colore Officii*, make it void; for he lets him to Bail who is not mainpernable. *Plowd. 69; 80. Dive and Manningham.*
3. Note also (*Nor any of his Officers*); it is not so, and the printed Statute is mistaken. It is not the Sheriff, nor any *de ses Officers* (or any of his Officers), but not any *des Officers*, not *ejus Officiarii*; but *alii Officiarii*. And so is old *Rastal*, which is in French, and so adjudged in *Langham's Case*.

In Debt on Bond to *Lenthal*, the Defendant pleaded it was for Ease; it was held to extend to the Marshal, tho' he is not one *de ses Officers*, but one *des Officers* and Ministers of Justice. *3 Keb. 71. Monday and Frogate.*

And if the Statute be misrecited, it may be demurred to, as it was in this very Case. *Cro. El. 108. Teussel and Aeton.* See after.

Again, As to the Three Forms to be observed:

1. That it shall be made to the Sheriff himself. *Vide infra.*

2. That

2. That it shall be made to him by the Name of his Office.

3. That it shall be only for Appearance at the Day and Place. *Cro. El. 862. Cotton and Vale. 2 And. 175. mesme Case.*

But as to the Insufficiency of the *Sureties*, that *Sureties* is Matter, and not Form, and the Obligation is not void. *Vide infra.*

The Statute prescribes the Form, and that the Sheriff, under Colour of his Office, should not oppress the Party to make him any other Manner of Obligation; for the Statute makes the Obligation void for not pursuing the Form, but not in the Matter thereof: Therefore the Sheriff may take one Surety, or one that has no Land in the County. *Cro. El. 808. Sir George Clifton's Case. Mod. Rep. 32. Franklyn's Case.*

Per Hobart, ex relatione Twisden: Because the Statute would make sure Work, and not leave it to Expositions what Bonds should be taken: Therefore it was added, That Bonds taken in any other Form should be void.

What Obligations and Conditions are good, or not.

1. In Respect to the Persons and Officers to whom they are made.

2. In Respect of the Form.

1. In Respect of the Officers or Persons to whom made.

Such Bond given to a Deputy of a Bailiff of a Town or Franchise is void, or to an Under-Sheriff's Deputy; Officer, it must be to the Bailiff or Sheriff himself. *Noy p. 69. Tavernor's Case.*

The Office and Duty of Sheriffs, &c.

Serjeant
at Arms.

A Serjeant at Arms, attending on the President and Council of the Marches of *Wales*, is not an Officer within this Stat. *Cro. Car. 9. Johns and Stratford. Style Rep. 234. Barton's Case. Dalt. 519.*

Bailiff of
an Hun-
dred.

If the Bailiff of an Hundred, which is a Franchise, takes Bond, he must do it in the Sheriff's Name. *3 Keb. 21, 117, 127. Monday and Frogate.*

This Bond must be taken to the Sheriff himself, and not to another. *Dyer 119. 10 Rep. 100. 7 Ed. 4. 5. Plowd. Com. 68. a. b.*

Serjeant
at Arms
of the
House of
Commons

The House of Commons had voted one *W.* guilty of High Treason, and the Plaintiff being a Serjeant at Arms, took the said *W.* into Custody; and the Defendant entred into Bond to the Plaintiff, conditioned for the said *W.*'s Appearance, who did not appear. Debt was brought, and on Demurrer, *per Cur'*, it's a void Bond by the Common Law, being entred into for Ease and Favour of the Prisoner, and he was not bailable. But the Court agree, the Plaintiff was not an Officer within *23 H. 6. c. 10. Obj.* The Condition recites the Bond was entred into for Appearance only, is an Estoppel to say it was for other Cause. *Per Curiam*, Here is no Estoppel; for Estoppel is when the Bond is a good Bond, then the Recital is an Estoppel; but when the Bond is void, the Estoppel is void too. *Hardres p. 464: Norfolk's Case.*

Estoppel.

Serjeant.

A Serjeant to the House of Commons is not within this Statute. *1 Keb. 391. Norfolk and Aylmer.*

If to the
Plaintiff,

This Statute doth not extend to a Bond made to the Plaintiff himself. *Allen pag. 58. Leech and Davis.*

If not,
in the
Name of
Office.

The Bond not being taken by the Sheriff in the Name of his Office, in Debt upon the Bond, the Defendant demurs upon *Oyer.*

Sed non allocatur; for the Statute is not pleaded, Pleading and it may be for a just Debt. 2 *Keb.* 620. *Jacques's* the Stat. Case. *Vide Dalt.* 522. *Cro. Eliz.* 862, &c.

Marshal and Under-Marshal of the King's Bench Marshal is within this Statute, and if he takes Bond against of B. R. this Statute, 'tis void. *Cro. Eliz.* 66. *Bracebridge* and *Vaughan.* 9 Co. 98. *Vide antea,* & *Dalt.* 360, 519.

A Bond to *Neele*, Sheriff of *Warwick*, and the County in Bond was to *Neele Vic' Com' prad'*, and *Warwick* the Mar- put in the Margent. *Per Dodderidge*, This is not a gent. good Bond, he ought to be named Sheriff, and of what County. 2 *Roll's Rep.* 360. *Neele* and *Cooper.*

After Oyer of Two several Sheriffs Bonds, De-Three fendant demurs. 1 *Saund.* 290. And upon the Ar-jointly gument it appeared, that Three were jointly bound, bound; and the Plaintiff declared against the De- and de- fendant singly, for which the Defendant demurred; gainst one but it was answered, That it did not appear the singly. other Persons had sealed the Bonds; and if not, then their Bond was single notwithstanding; and if in Truth they had sealed, then the Defendant should have pleaded it in Abatement, and that they were living, &c. And the whole Court was of the same Opinion. And Judgment *pro Quer'*, *nisi*, &c. See 6 *Mod.* 122.

As to Appearance, &c. whether the Form of the Condition is good, or not,

Vide Dalt. 358, 359, 360, &c.

An Obligation to the Sheriff to appear and an-To ap- swer, &c. is void by the Statute of 23 *H. 6.* *Aliter* pear and to appear to answer; for the Party by the Law answer. may appear, yet Judgment may be given by De- fault. *Noy* 53, 54. *Lord Ever's Case.* *Dyer* 274. *contra* 172. *Rowles* and *How.* *Sed vide postea.* Q

118 The Office and Duty of Sheriffs, &c.

Condition to make an Appearance, *quare* if good.

Given before the Writ, &c. *Et vide 1 Keb. 554. pl. 66.* Where a Bond given to the Sheriff for Appearance, (before the Writ was delivered) was allowed good. *See after.*

Where the Term is adjourned. Obligation was taken by the Sheriff for an Appearance at *Westminster*, and the Term was adjourned to *St. Albans*, and the Party appeared there; he had not forfeited the Obligation, *quare. Mo. n. 578. Corbet and Dawning.*

Relation. The Obligation shall alway relate to the Day and Place comprized, and he ought to appear at the King's Bench, or else he forfeits his Bond. *Mo. 466. See after.*

To answer as shall appertain, &c. The Condition was, If the said *J. D.* personally appeared, &c. *à die Pasche in 15 dies*, to answer to *J. H.* as shall appertain, and farther to do and receive as the Court therein shall consider in that Behalf, That then, &c. it's a void Bond. *Cro. Eliz. 672. Scriven and Dyther. Dalt. 522.*

Bond for Appearance before Process comes. If the Sheriff take an Obligation for the Appearance of *J. S.* before Process comes to him to arrest *J. S.* and after the Process comes, this Obligation is good. *Siderfin p. 151. 1 Keb. 554.*

Bail-Bond was to appear at *Westminster, die Sabbati prox' post Purificat'*, to answer, it's ill; it was intended the Feast-Day. *3 Keb. 260. Rod and Huans.*

Mistake of the Day. Bill of *Middlesex* was returnable *die Veneris*; the Condition of the Bail-Bond was, If the Defendant appeared *die Sabbati*, it is a void Bond. *1 Sand. 21, 22. Bennet and Filkins. Dalt. 523.*

To appear and answer. Condition to appear and answer, is good enough, *2 Cro. 286.* though *Mildmay* and *Cage* his Case was objected, being intended generally to answer any Action, and the Writ was of *Trespas*s. *3 Keb. 422. Briscoe and Richardson.*

The Condition of the Bond was, That if the Defendant do appear in *Banco Regis* such a Day, then the Condition of the Obligation to be void; yet *per Cur'* both are good. For if these Words were omitted, it is but Surplusage. *Siderfin* 456. *Maleverer* and *Hawkins*. 2 *Keb.* 615. *mesme* Case. *Mod. Rep.* 35. *mesme* Case.

To a Condition to appear before his Majesty's Justices of the King's Bench at *Westminster*; the Defendant pleads the Statute of 23 *H. 6.* and that this was *alia forma*; it should be *coram Dom' Rege ubicunque*, &c. yet it was adjudged good. The Statute is not to be avoided by such Mistakes of Returns. 3 *Keb.* 551, 611, 627.

So in *Cadwell* and *Dawkin's* Case the Condition was, *Ad respond' E. exec' in plac' Trans' de 100 l.* and the Writ was, *Ad respondend' E. in placito Tresp' ac etiam Billæ 100 l. de debito*, &c. this Variance is not material, if the Bond be made in the Name of his Office, and the Condition expresses the Time and Place of his Appearance, and at whose Suit, it's enough. *Cro. Jac.* 286. *Villars* and *Hastings*, Sir *Tho. Jones* 137. *Cudwell* and *Dawkin's* Case; so *Kerby* and *Curtis*.

The Condition is, If such an one who is arrested on a *Latitat* appeared personally, and answered, &c. in regard his Appearance is necessary to put in Special Bail, if the Party require it, the Bond is good. *Cro. El.* 776. *Bowles* and *Hersteo*, 10 *Rep.* 100.

A Writ out of the King's Bench was returnable out of Term, the Sheriff takes the Party, and takes Bond to appear at the Day of the Return, and for Non-appearance brought Debt on this Obligation: This Bond was void by the Statute, and the Sheriff shall not be amerced for Non-appearance, nor liable to any false Imprisonment by the Party. 2 *Siderfin* 129. *Jenkins* and *Hatton*.

To answer

Transf. ac etiam Billa.

The Writ is *placito Transf.* the Condition of the Bond is to answer *Ac etiam Billa* 100 l. in *placito debiti* is void, being another Writ; but if the Writ were in *placito debiti*, or the Bond taken only to answer the Writ in *placito Transf.* it were well enough. And a *Nil capiat per Billam* was awarded on Demurrer by the Plaintiff upon the Defendant's Plea upon the Statute, it being in *alia forma*. 3 Keb. 164. *Mildmay and Cage*, and p. 711. *Moor and Finch*. *Dalt.* 521.

Ad respondend' de placito debiti, without mentioning the Sum.

Ad respond' de placito debiti is good, without mentioning the Sum. The Bond ought to be made to the Sheriff by the Name of his Office, and ought to express the Day and Place of his Appearance; and these Circumstances being observed, though it be variant in other Circumstances, it's not material. *Cro. Mich.* 9 Jac. 286. *Villars and Hastings*. *Dalt.* 521. *Stile* 257, 258.

Bond taken by the Sheriff after the Day of the Return.

The Sheriff cannot take Bond to appear at another Day than is contained in the Writ. 2 Keb. 526.

If an Obligation be taken by the Sheriff after the Day of the Return, it's void by the Statute, and is not a single Obligation; and the Statute was made to prevent such great Oppressions; for the Party so taken after the Return, may not be bailed without coming before a Judge; and he may not do this out of Term without the Consent of the other Party. *Siderfin* 301. *Courtney and Phelps*.

On Attachment out of Chancery.

Variance.

L gives Bond to the Sheriff, being arrested by Attachment out of the Chancery. The Condition was, That the Defendant should appear such a Day in Chancery, *apud Westm. ubicunque fuerit*. This Bond is within the Statute, but here the Variance makes it void, *Ubicunque fuerit*. 2 Keb. 526. *Levezer and Radshaw*. *Stile* 234. *Burton and Low*. 3 Keb. 599, 614. *Kirby's Case*.

As to Courts.

The Sheriff, by Virtue of an Attachment un-Court of der the Privy Seal of the Court of Requests, Requests, took the Defendant, and for his Enlargement made the Obligation to appear before the King's Counsel, &c. *Per Cur'*, Here is no Warrant to take the Body, or the Obligation; for that Court hath not any Power by Commission, Statute or Common Law. *Dalt.* 520.

Dalt. 521. Upon a Bond issuing out of a Court *Per Du-* that had no Authority to grant it, this Bond was ^{refs.} said to be taken by Duress, and so avoidable by the Award of the Court. *Cro. Eliz.* 646. altho' it was alledged, that the Sheriff took it *colore Officii.*

So upon an Attachment out of the *Chancery.* *Chance-* *Dalt. ibid.* *Stile* 234. *ry.*

But the Sheriff ought to obey the Process out *Dutchy-* of the *Dutchy-Court*, for that is appointed by A Court, of Parliament, but the other is not within the Statute; for the Statute speaks of such who are in their Custody by Course of Law. So this Obligation is avoidable by *Duress.* *Cro. Eliz.* 646. *Stephens* and *Fludd.* 2 *Anderson* 122. *mesme* Case.

Plaint in a Court-Baron of 39 s. and an At-Court-attachment against the Defendant's Goods, and de-Baron. tained till the Plaintiff caused a 40 l. Bond to be made to the Plaintiff himself to appear and answer, and Condemnation by a Day, and pleaded the Statute of 27 H. 6. This Bond is void at Common Law.

It's void also for Extortion, because of the un-Extor-reasonable Sum, &c. and the Statute doth not ex-tion. tend to such a Bond. 1 *Keb.* 872, 873. *Randall* and *Keite.*

Not according to the Stile of the Court.

The Condition was to appear before the Justice *de B. R.* at *Westminster*, and saith not *ad placita coram Nobis tenenda ubicunque*, &c. the Variance is not material, and by common Intendment it is the same Court. Sir *Thomas Jones* 46. *Kirby* and *Curwin*.

As to Sureties.

Sureties.

The Statute saith, That he shall take Obligation with sufficient Sureties; but this is for the Benefit of the Sheriff, that is, for his Indemnity; that if he be amerced for Non-appearance of the Party, he shall have his Remedy; for he may take what Sureties he thinks fitting. *Mo.* 636. *Cotton* and *Vale. Dalt.* 364, 520.

Bond not void for Insufficiency of Sureties.

Therefore if the Sheriff take Obligation for Appearance, it's not void *per Stat.* 23 *H. 6.* for Insufficiency of the Sureties, or that the Surety had no Land; for the Sheriff may take one Surety or two. 2 *Andersf.* 157.

The Sheriff is Judge of the Sufficiency, and it's no Plea to say, he took Bonds of insufficient Persons. *Moor Rep.* 118. *Cotton* and *Vale.*

And though the Surety be not an Inhabitant in the County, nor had any Estate there. *Dalt.* 520.

Party must be in Ward.

The Party that gives the Bond, must be in the Ward of the Sheriff. So is *Beaufage's Case.* *Vid.* 10 *Rep.* 99. *b. Winch.* p. 20, 50. *Empson* and *Bathurst.*

The Bond must be taken of the Person who is in lawful Custody.

So Condition to appear; the Defendant on Oyer pleads the Statute of 23 *H. 6.* That the Plaintiff (Bailiff of *St. Edmondsbury*) imprisoned the Defendant without Warrant, and thereon took the Bond. *Per Cur'*, It's an ill Plea; for the Bond must be taken of the Person in Custody, *i. e.* lawful Custody; and this Bond is voidable by

by Durefs at Common Law. 3 Keb. 756, 760. Lord Suffolk and Birket, Sir Thomas Jones 76. *mesme* Case.

The Sheriff upon a *Fieri Fac'* took Bond of To pay the Defendant to pay the Money in Court at the Money in Return of the Writ, this is good, and not void by Court. Stat. 23 H. 6. Vide Dalton 443. 10 Rep. 99. Beaufage's Case.

Colore Officii.

Colore Officii is taken in *malam partem*. No What it Sheriff shall take Obligation contrary to the Sta- is, and to tute *Colore Officii*. As one in Execution escapes what it and is retaken, and then a Bond is made for his extends, Enlargement, this is *Colore Officii*. But if a She- or not, riff take a Bond for a true Debt, this is good, because it's not *Colore Officii*. 2 Leon. 118. Philips and Stone.

Debt on Obligation taken by the Plaintiff She- By the riff, of the Defendant his Clerk, upon Condition Sheriff, to pay the King's Silver into the Exchequer with- of his in Fourteen Days after he received it. The De- Clerk. fendant pleads Stat. 23 H. 6. and averred it was taken *Colore Officii*. And upon Demurrer it was adjudged for the Plaintiff; for the Statute doth not intend such Obligation taken of them which are not to appear, nor in Custody. The Plea that the Bond is taken *Colore Officii*, will not avoid a Bond taken of the Party to do what he ought. Mo. n. 685. Cartwright and Dalesworth. 3 Keb. 790.

A Bond for Tuition of a Child as Curator, and Curator to give Account to the Ordinary, is but a volunta- Tutor. ry Undertaking of the Guardian, and so not within the Stat. 23 H. 6. and it's good at Common Law, notwithstanding 3 Inst. 149. 3 Keb. 671.

Note,

The Office and Duty of Sheriffs, &c.

The whole Bond is void, if against this Statute in any Point.

Note, If the one Part of the Condition be according to the Statute, and the other not, all shall be void; for the Statute extends to the whole Bond. *Dive and Manningham. Pl. 68. b. Palmer Rep. 378. Noel and Cooper.*

If the Sheriff take Bond for a Point against this Law, and also for a due Debt, the whole Bond is void. *Hob. p. 14.*

Vide Dalt. Sh. 521. If it be good in Substance, though not in some Circumstances, yet within the *Stat. Cro. Jac. 286.*

Warden, &c. excepted.

Note, The Warden of the Fleet, and the King's Palace at Westminster, are excepted out of this Act.

Of Pleadings.

Regula.

Regula. This is a particular private Law, and ought to be pleaded.

Where not pleaded.

Condition was, That J. S. appeared in B. R. &c. The Defendant demands Oyer, and so demurred, because it is not taken by the Sheriff in the Name of his Office. *Sed non allocatur*; the Statute being not pleaded, (as *Whelpdale's Case*) no Exception can be taken against it, for it may be a just Debt. 1 *Sand. 155. Dive and Manningham's Case, Parker and Wells. Siderfin 24. Allen and Robinson. Hob. 13. contra. 3 Keb. 320, 361. Oaks and Ceel.*

Aliter where not pleaded.

See 2 *Saund. 153, 155.* Action against the late Sheriff for suffering an Escape, and returning *Cepi Corpus*, &c. Hereupon Judgment was given for the Plaintiff, and the Reason thereof entred, because the Defendant had not pleaded the Statute, and shewn the Matter of Fact, of which they would not take Notice, unless it was pleaded. And Justice *Twisden* said, It had formerly

merly been settled so; yet he thought it ought to be ruled and settled otherwise, but the Court would not recede from their former Resolutions and Judgments: And therefore it was adjudged for the Plaintiff.

Where the Arrest is in one County, and the Bond taken in another County, this Bond was said to be out of the Statute; and the only proper Remedy which the Defendant hath to avoid it, is to plead *per Duress* to it. *Dalt. 521. Cro. Jac. 745.*

A Condition to appear in *B. R.* according to Plea no Custom, at the Suit of *M.* On *Oyer* the Defendant pleads, There is no such Custom in *B. R.* as the Plaintiff hath alledged, to appear to an *Eti- am Billa*, and so the Obligation void. The Plaintiff demurs, and Judgment *pro Querente*; because the Statute of 23 *H. 6.* is not pleaded, being a particular Law. But it might be pleaded the Bond was by Duress, being in another Manner than the Statute allows; and that Statute makes the Bond void for the Whole. 2 *Keb. 620. 3 Keb. 60, 181. Forth and Walker.*

If the Statute be misrecited, it may be demurred to. *Siderfin 356. Holbay and Bray. 2 Keb. 278. 1st. Pench and Woodnoth.*

Quære, How the Court will take Notice of it, by the printed Book, or by the Record, or otherwise?

Regula. To plead an Appearance, and not to say, Regula. —Prout patet per Recordum, is naught.

Prout patet, &c.

So *Corbet's Case*: On the Sheriff's Bond it must be averred to be on Record in the Rejoinder as well as in the Bar. 1 *Brownl. 91. Andrews and Robins. Cro. El. 466. Corbet's Case. 2 Keb. 250, 278. Knight and Pitt.*

Con-

Upon Adjournment of the Term. Condition was, If he appeared at *Westminster* such a Day, to answer, &c. The Defendant pleads, That before the Day of the Return of the Writ the Term was adjourned to *Hartford*, and that there he appeared. The Plaintiff demurs. *Per Cur'*, He ought to conclude his Plea, *prout patet per Recordum*; for though he appeareth, yet if his Appearance be not entred of Record, he forfeits his Obligation; and he ought to conclude his Plea so, otherwise the Plaintiff cannot answer thereunto, as to say, *Nul tiel Record. Cro. Eliz. 466. Corbet and Cooke.*

Comparuit ad diem. Debt upon a Sheriff's Bond for Appearance in B. R. the Defendant pleads *comparuit ad diem*; the Plaintiff denies it, and by *Mittimus* out of the Chancery it was brought into the Common Pleas, and Judgment there given. *Palmer and Steward* cited, *Gro. Car. 297. in Lutterel and Lea's Case.*

Non est factum not to be pleaded. Though the Bond is made void by Act of Parliament, yet the Party may not plead *Non est factum*, but must plead the Special Matter, and take Advantage of the Act of Parliament. 5 Rep. 117. *Whelpdale's Case.*

Traverse, That he was in Prison *tempore confectio- nis*, not good. In Debt upon Bond, the Defendant pleads the Statute of 23 H. 6. and shews that *W.* was in Execution, and that the Bond was made for his Deliverance against the Statute. The Plaintiff replies, That *tempore confectio- nis* of the said Bond *W.* was at large; *absque hoc*, that he was in Prison *tempore confectio- nis*, &c. the Traverse is not good: For one may be in Prison, and make a Promise to make a Bond, for which he is enlarged, and within an Hour after he makes the Bond, the same is within the Statute; it ought to have been *absque hoc*, that it was made *pro deliberatione*. 2 Leon. 107. *Bowes and Vernon, 2 Keb. 512. Die and Adams.*

Debt

Debt on Bond, dated 25 Sep. the Defendant Plead *pro*pleads a *Capias ad satisfaciend'* was awarded *amo deliberat'* against *B.* who was taken on it the 30th of Sept. *rat'* after the Arrest. and that the Obligation was made for the Enlargement of *B.* The Plaintiff demurs, and had Judgment, because it appears the Bond was made before the Arrest, and so could not be avoided by 23 H. 6. but he ought to have pleaded it with a *primo deliberat'* after the Arrest. *Noy 23. Collins and Philips.*

To Debt on Bail-Bond to appear, the Defendant Pleas, dant pleads before the Day he was taken by That be-fore the *Capias Uilagar'*, and detained till after the Day, Day of and so could not appear, The Plaintiff demur-Appeared, and it was adjudged to be an ill Plea; forance he the Party may remove himself by *Habeas Corpus*, was taken and if this should be good, all Bail-Bonds may be by a *Cap' Uilagar'*. thus avoided, and the Plaintiff doth but his Duty. *2 Keb. 262. Jeffreys and Cooper. Siderfin 406. id. Case.*

In Debt, the Defendant pleaded the Statute of 23 H. 6. and that was for Ease and Favour, and not for a just Debt. The Plaintiff replies, It was for a just Debt, *absque hoc* that it was for Ease and Favour. To which the Defendant re-Rejoins specially, and the Rejoinder was set aside der set aside, and the Plaintiff entred Judgment for not joining on Judgment entred. the Issue tendred by the Plaintiff: And *per Cur'*, the Judgment was affirmed. *2 Keb. 554. Berry and Bishop.*

Regula

Regula. *Regula.* For when an Issue and Rule is given, the other Party must join, and cannot depart to any new Matter.

Traverse. A Sheriff brought Debt on a Bond, dated the Time of 13th of June, the Defendant demands Oyer on the Delivery of the Condition, which was, That if he appear the Bond. *Veneris prox' post tres Trin'*, and pleads, That *Veneris prox' post Trin'* was 14 Junii, and that he was imprisoned by the Plaintiff till the 19th of June, and that the Obligation *supra fuit primo deliberat'* by the Defendant the 19 of June; *absque hoc*, that this was delivered as his Deed before the 19th of June. *Siderfin p. 300. Courtney and Phelps. 2 Keb. p. 108, 109, 122. mesme Case.*

Per Cur', This is not a good Traverse; it ought to have been, *absque hoc*, that it was delivered as his Deed before *die Veneris prox' post tres Trin'*. For if the Traverse *supra* be allowed, the Plaintiff shall be excluded from answering to the Time alleged of the Return, although it be false.

Traverse. The Defendant pleads *Stat. 23 H. 6.* and that Time of he was in Custody by Warrant of a Writ returned the Re- ed *Veneris post Octab. Purificat'*. The Plaintiff replied, the Defendant was taken by a Warrant on a Writ returned *Sabbat' post Octab' Purific'*, and not by any Writ returned *Veneris*, &c. The Defendant rejoined, That he was in Custody by Virtue of a Writ returned *Veneris post Octab. Purificat'*, *absque hoc* that he was taken by any Writ returned *Sabbat' post Octab'*. The Plaintiff demurs. *Per Cur'*, This is no Traverse upon a Traverse, and there would be no Traverse in the Replication, which would make an End, but in the Rejoinder it doth. *2 Keb. 94, 105. Bennet and Phil.*

Philkins. 1 Saund. p. 20. mesme Case. 3 Keb. 656.

Gold and Cutler, 191. Sturges.

Debt on Bond; the Writ was, *Ad respondend' Tunc Vic' H. G. nuper Vic' Norf. and the Count was, Qd' N. existen' concessit se teneri prafat' J. H. in pradiet' 40 l. and saith not, Tunc Vic. Norfolc' existen'. And Sur Demurr' upon the Bar, it was adjudged per Cur', Que leunt fuit insufficient. Cro. El. 800. Guyben and Whichstcomb. 3 Keb. 191. Twistleton and Dunken.*

J. S. puts himself in a special Bailiff, and arrests J. D. and takes Bond, &c. This is by Du-Bailiff refs, and the Defendant may plead that; yet it is takes not within the Statute, nor aided by it. For J. D. Bond. was never in the Sheriff's Custody after the Arrest, It is by and the Bond was taken out of the County where Durefs. he was arrested, and so by Durefs. Cro. El. 746. *Brown and Adams, 3 Keb. 756, 760. Earl of Bristol and Lord Burkin.*

The Defendant pleads to the Sheriff's Bond, After the that there was no Writ ever delivered to the She-Writ pur- riff, and so would avoid it by Stat. 23 H. 6. The chased, Sheriff after the Writ sent out, but before the De- and be- livery, takes Security: Which per Cur', he may, if Delivery the Defendant will give it. 1 Keb. 554. *Bromfield of it to the Sheriff, he may take Security.*

What Appearance to a Sheriff's Bond is good, &c.

If Appearance be the same Term, it is good. Appear- The Defendant pleads to a Sheriff's Bond, ance after taken for his Appearance in B. R. *die Sabbat' the Day prox' post Octab' Sancti Martini*, and that he ap- is good. peared at the Day: And the Court of Common Pleas gave him a Day to bring the Record of his Appearance by *Mittimus* out of the Chancery. And the Record was certified, that he appeared *Luna prox' post Quinden' Martini*, which was

The Office and Duty of Sheriffs, &c.

after the Day, and adjudged good. *Brownl.* 58. *Statfield* and *Grony*, *Idem.* 74. *Carter* and *Freeman*.

So in *Daly* and *Fryar's* Case: The Parties appeared two Days after the Day in the Condition; it is good, and shall be a Discharge of the Bond; for the whole Term is but one Day in Law. So it is in the Common Pleas, and in the King's Bench. 2 *Bulstr.* 255. *Daly* and *Fryar*.

Appear-
ance not-
with-
standing
Supersede-
as.

A Debtor having given Bond to the Sheriff to appear, though a *Supersedeas* comes to the Sheriff before the Day of Appearance; yet he shall appear to take his Bond.

Comperuit
ad diem,
how Issue
to be
join'd,
&c.

A Sheriff sues his Bail-Bond for Non-appearance: The Defendant pleads *Comperuit ad Diem*. The Plaintiff replies, *Nul tiel Record comparentia*. The Defendant rejoins, *Quod habetur tale Recordum*. Now the Proof lies on the Defendant's Part, to produce the Record in Court.

Appear-
ance to be
tried per
Recordum.

A Condition to appear in *B. R.* where the Process is returnable, &c. The Defendant said in *Facto* that he had appeared *secundum formam*, &c. *Et hoc petit*. Repleader was awarded; for it must be tried by the Record.

Of Ap-
pearance
when no
Process is
returned.

A. is bound to appear such a Day, &c. and *A.* at the said Day goes to the Court; but there no Process is returned. Then the Party may go to one of the Chief Clerks of the Court, and pray him to take a Note of his Appearance. *Vide* the Form of the Entry in such Case. 1 *Leon.* p. 90. *Brett* and *Shepard*.

Nul tiel
Record.

If the other Party plead *Nul tiel Record*, it behoveth that the Defendant hath the Record ready at his Peril: For the Court of Common Pleas cannot write to the Justices of the King's Bench, to certify a Record thither.

Of the Sheriff's Return upon taking Bail, and of his taking insufficient Bail, or his refusing sufficient Bail, and the Remedy: And his Pleading in an Action brought against him.

Note, After the Statute of 23 H. 6. the Sheriff On *Capi-* cannot make a Special Return in a *Capias*; but *as*, *Cepi* only a *Cepi Corpus* or *Non est inventus*: And the *Corpus*, or Statute, though it compels him to take Bail, yet it *Non est inventus* does not alter the Return. The Design of the Statute is to provide against the Extortion of Sheriffs, being obliged to Return *Cepi & paratum habeo*, and yet to let the Defendant at large; and therefore there is no Reason he should be charged for not having the Body at the Day.

The Return of a *Paratum habeo*, is in Effect *Paratum* no more than that he hath the Body ready to *babeo*. bring into Court, when the Court shall command him.

And for this false Return of *Paratum habeo*, he Sheriff is amerceable to the Court till he do bring in the amerce- Body (and the Common Practice is so); but that *able*. is nothing to the Party, and no Action lies against *Quousq;* him by the Party. And therefore, *vid. Page and &c.* *Tulsey's Case. Mod. Rep. 244.*

Now, as to the Sheriff's Taking insufficient Bail, and Refusing to take sufficient Bail, the Law stands thus:

If the Sheriff refuse to take Bail, he is liable to Refusal an Action of false Imprisonment. of Bail.

If the Sheriff refuse to take reasonable Bail, Reason- an Action on the Case lies against him. *Siderfin* able Bail. pag. 23.

132 The Office and Duty of Sheriffs, &c.

Insuffici- ent Bail. If the Sheriff take insufficient Bail, yet no Action lies against him by the Party; for he is Judge of the Bail. *Vide supra & post. contra.*

Case for an Escape. In Action on the Case against the Sheriff for Escape: The Defendant pleads the Statute of 23 H. 6. that he let H. to Bail, and took reasonable Sureties, A. and B. Persons having sufficient within the County. The Plaintiff replies, *Absque hoc*, that he took Bail, having sufficient within the County. The Defendant demurs, and Judgment *pro Defendente*. *Mod. Rep.* 227. *Ellis and Yarborough.*

Sheriff pleads Stat. 23 H. 6. Paratum habeo. Where Trespass on the Case was brought against the Sheriffs of *Middlesex* for suffering an Escape, and returning *Cepi corpus*, and *Paratum habeo* (which was false); the Defendants plead, that the Party arrested put in J. B. and J. C. Sureties, and plead the Statute of 23 H. 6. and they took Bond according to the Statute, and so let him escape. *Per Cur'*, The Plea is good, for the Reasons aforesaid. So in *Bowles* and *Lassell's* Case, if the Sheriff return a *Languidus in Prifona*, having taken Bail *secundum Stat'*; it was adjudged, that though the Defendant was at Large, yet no Action lay against the Sheriff. All this must be understood of *Mean Process*, for else this would be to frustrate the Statute of 23 H. 6. *Cro. El.* 852. *Bowles* and *Lassells*.

Mean Process. But Note, Then it must appear to the Court on the Record, that it is on the Statute of 23 H. 6. and not a Return at Common Law: And the Sheriff may in such Case plead *Not Guilty*. *Siderfin* 22. *Allen* and *Robinson*.

Not Guilty. But if the Sheriff demurs to the Declaration, then the Action is against him: For the Declaration shall be taken to be true upon the Demurrer. *Narr'*, the Action is against him. For the Statute is private, and the Court will not take Notice of it unless it be pleaded. But if

if the Defendant had pleaded this specially, or if he had pleaded *Non Culp*, he might have had Advantage of the Statute, and ousted the Plaintiff of his Action. *Cro. El.* 624. *Barton and Aldworth.* 1 *Siderfin* 439. *Parker and Welby.* *Mod. Rep.* 244. *Page and Tulse,* p. 33. *Franklyn and Andrews,* *M. n.* 427. *Cro. Eliz.* 460. *Gardner and Langton.*

By these Words in the Statute, *That if the Cepi Cor-Sheriff return a Cepi Corpus, he shall be charge-able to have the Body at the Day of the Return, &c.* it is intended only that he may be amerced to the Amerce-King for not having the Body at the Day. 2 *Sand. ment.* 60. *Postern and Hanson.*

An Action on the Case against the Sheriff for For not not taking reasonable Sureties, not having sufficient Estates in the said County, and returning *Cepi Corpus*, and yet not having the Bodies ready by the Day, lies not; for he is compellable to let to Bail, and if he have not the Body he shall be amerced; and because he shall be amerced, the Statute gives him Advice to take sufficient Sureties for his own Indempnity. 2 *Sand.* 59. *Postern and Hanson.*

In Action on the Case for taking insufficient Sheriff Bail: The Defendant pleads, he had taken sufficient Security. He need not say where, nor need he traverse the Intent, to deceive the Plaintiff of his Debt: For it is not issuable at what Place the Security was taken, and therefore need not be shewed, and the Intent is not where, traversable; and had the Defendant pleaded so, it had been ill. *Siderfin* 96. *Bentley and Hore.*

Action on the Case against a Sheriff for taking insufficient Bail. The Defendant pleads the Sheriff is Statute of 23 *H. 6.* c. 10. The Plaintiff demurs to plead to the Bar, because the Sheriff had not alledged, that

The Office and Duty of Sheriffs, &c.

that he had dismissed one *B.* (whom he had taken) by sufficient Mainpernors, but only alledged this by way of Implication, and not positively. 2 *Sand.* 58. *Postern* and *Hanson*; see *Salk.* 99. That he is liable to an Action for taking insufficient Bail.

Of Bail-Bonds, being Discharged or Assigned.

Where the Bail-Bond shall be discharged, the Amerciaments, Bond is the only Remedy, and they will not discharge that on ordinary Rules. In this Case *North* not.

In Debt on Sheriff's Bond, the Principal being in Prison may be admitted to plead, discharging the Amerciaments, (and this is the Course of the Court) where the Prosecution is fresh: But where the Defendant in the Original Action, (*viz.*) the Principal is become insolvent; *Per Cur'* the Bail-Bond is the only Remedy, and they will not discharge that on ordinary Rules. In this Case *North* prayed the Continuance of Process on the Bail-Bond, in regard since the Default of the Appearance of *Fludd* the Principal, he is become insolvent by suffering several Judgments. But *Jones* said, That the Bail appeared on the very Day of the Return, and the Default is the Plaintiff's own, and the Bond not above a Year old. And *per Cur'*, paying the Amerciaments and Costs, the Bail were discharged, and the Principal admitted to plead. 2 *Keb.* 545, 553. *Fludd* and *Williams*.

Bail-Bond sued by the Surety who paid the Debt, &c.

The Surety paid the Debt, and he sued the Bail-Bond assigned by the Sheriff; on which a Writ being directed to the Coroners, they took a New Bond and assigned it, and they prayed the Money out of the Coroner's Hands for the Surety. *Per Cur'*, The Coroner cannot discharge his Bail-Bond no more than the Sheriff, and they ordered the Principal Debt to be paid. 2 *Keb.* 287, 400. *Foster's Case*.

Discharged by Payment before the Return.

A Bail-Bond was discharged upon Motion, the Money being paid before the Return of the Writ, and common Appearance ordered. 3 *Keb.* 356. *Randall's Case*.

If

If the Defendant appears not to the Sheriff's Assign-Bond according to the Condition thereof, the Plaintiff may (by the Leave of the Sheriff) sue the Bond in the Sheriff's Name; but it's at the Plaintiff's Election to sue the Sheriff: And the Sheriff shall be amerced till he assign the Obligation to the Plaintiff. *Pract. Reg.* 117. *Siderfin* p. 24.

And see the late Act for Amendment of the Law, concerning the Sheriffs, or Officers assigning over Bail-Bonds for the Use of the Plaintiff.

When Bail is put in *de bene esse*, (as Bail taken in a Chamber) the Plaintiff cannot sue the Sheriff's Bond till it be refused or set aside; but he ought to except against it in the Judge's Chamber. 1 *Keb.* 478.

The Court cannot compel a Sheriff to assign his Bond regularly. But in some Cases they will, as the Party was arrested by the Sheriff, and through his Default in not returning the Writ, the Defendant died. Now in this Case, he shall not take Advantage of his own Wrong; but shall assign the Bail-Bond, or pay the utmost Amerciaments. 2 *Keb.* 388. *Hill and Browning.*

But the late Act for the Amendment of the Law, says the Sheriff, or other Officer at the Request and Costs of the Plaintiff, or his lawful Attorney, shall assign the Bail-Bond, or other Security, and attest it under his Hand and Seal in the Presence of two or more Witnesses, which may be done without Stamp, provided the Assignment so indorsed be duly stamped before any Action be brought thereupon. By 4, 5. *Anna cap.* 16. He may be compelled.

It was moved in *B. R.* to stay Proceedings upon Bail-Bond, upon discharging the Amerciaments and Costs (as is usual). But it was alledged on the other

Bond shall not be stayed until Special Bail given.

The Office and Duty of Sheriffs, &c.

Side, That after the same Bail given, the Principal had *sold his Land*, and became *irresponsible*, and render'd himself to the *Marshalsea*. And for this Cause the Court refused to stay Proceedings, and said it could not be done until he had given Special Bail; because they did not cause him to appear at first, according to their Obligation. And so it is, when the Principal on such Default of Appearance becomes a Bankrupt. *Siderfin, Pag. 386.* And it seems where the Under-Sheriff delays executing a Writ, &c. till the Party has aliened, &c. he himself ought to be answerable.

Of other Bonds (besides Bail-Bonds) entred into the Sheriff, what are good, and what not: And Pleading.

Vide infra Tit. Bonds between the High-Sheriff and Under-Sheriff, and others.

Bond to be a true Prisoner.

A Bond given to be a true Prisoner (as by Law he ought) is good, and not within the Statute of 23 H. 6. As to this,

Lenthall and Cooke. There is a notable Case of *Lenthall* and *Cooke*. The Case is,

Lenthall the Marshal brings Debt on Bond against *Cooke*. The Condition was.

The Condition. If the above-bounden *A. P.* now Prisoner in the King's Bench in *Southwark*, do and shall from henceforth be and continue a true Prisoner, in the Custody, Guard, and safe Keeping of the above-named *John Lenthall*, Marshal of the same Prison; and in the Custody, Guard, and safe Keeping of his Deputy, Officers and Servants, or some or one of them, until he shall be lawfully discharged, with-

without committing any Manner of Escape or Escapes during the Time of his Restraint; then this present Obligation to be void.

The Defendant pleads the Statute of 23 H. 6. of Plead- Obligations made to the Sheriff *colore Officii*. And ings. further pleads, That at the Time, and long before the Plaintiff was Marshal, that P. at the same Time was a Prisoner at the Suit of, &c. And that the Defendant, together with the said P. *pro easi- amento & favore* to be shewed by the Plaintiff to the said P. made the said Bond, &c. The Plaintiff replies, the Bond was *pro meliori securitate* of the said Plaintiff, that the said P. should not escape, and traverseth the Ease and Favour. The Defendant demurs.

And these Things were resolved by the Court.

1. That the Marshal of the King's Bench is within the Words, *Gaoler and Keeper of Prisons*.

2. Bonds made to Gaolers for *Ease and Favour of Prisoners*, are void.

3. A Bond given to save harmless from *Escapes*, Bond to is within this *Statute* and void; but a Bond to save continue a true Prisoner is good: And there is no harmless Agreement, that it is for *Ease and Favour*, ap- from E- appears, but the contrary rather; for the Plaintiff in his Replication hath traversed it, and the Defendant hath confessed the Replication to be true by his Demurrer. 1 Sand. 162. Lenthall and Cooke. Latch. 23, 143. Elworthy and Perryer, and Hill there cited.

This Case of *Lenthall and Cooke* is reported by *Siderfin*; and the Case there truly put as here.

The Intention of the Obligation was for *Ease and Plea, Favour*, and traversing it hath taken it away.

Now when the Defendant had such Issue of-Demur- ferred, and refused to join, but demurs; the De- rer. fen-

Defendant agreed it was not for Ease and Favour. *Siderfin* 283.

Note, *A little Evidence in such Case would serve to prove Ease and Favour.*

Warden. A Bond to the Warden of the *Fleet* to be a true Prisoner. The Defendant without pleading the Statute saith, it was for *Ease* and *Favour*. The Plaintiff demurs. The Plaintiff should have traversed the *Ease*. And Judgment for the Defendant. 3 *Keb.* 320, 361. *Oakes* and *Cell*.

To permit him to go at large for 6 Days. Condition is, Where *D. F.* is under his Custody (*i. e.* of the Obligee) upon Arrest, at the Suit of the Plaintiff, in Action of Debt of 1400 *l.* upon Bond by him to the Plaintiff, and at the Request of the Defendant he is permitted to go at large for six Days. If therefore the said *D.* before the 12th of *February* renders himself a Prisoner to the Sheriff of *Middlesex* at the Plaintiff's Suit on Action of 1400 *l.* and remain a true Prisoner till he shall be discharged by Consent of the Plaintiff. See the Pleading. *Quare de Judgment*, *Sir Tho. Jones*, *Rep.* 139. *Rushant* and *Waite*, *Siderfin* 132.

Of one in Execution. But the Bond of one in Execution to be a true Prisoner is within this Statute, and void, And as to this, the Case was:

Manningham's Case. The Condition of the Bond was, If *Thomas Manningham* keep the Sheriff without Damage against our Lord the King, and one *T. P.* and at all Times be at the Commandment of the said Sheriff as a true Prisoner, and appear before the Justices, &c. Then the Obligation to be void.

Conclusion of the Plea ill. The Defendant pleaded the Statute of 23 *H. 6.* and that the Body of *Thomas Manningham* was in Execution upon a Recognizance, and that the Sheriff made the Obligation for the Delivery of the said *Thomas Manningham*, and demanded Judgment

ment *fi Actio*, i. e. If the Plaintiff ought to maintain his Action,

This is no good Conclusion of the Plea; he ought to have concluded, *Iffint nient non fait*. For the Statute saith it shall be void; and if it shall be void, then it shall be void from the Beginning, and then it is not his Deed. And further, That he had not wisely concluded his Plea; for this Special Conclusion had straitened the Defendant so, that if the Obligation be void for any other Cause, the Defendant shall not have Benefit of it. And yet because it appeared to the Judges on the Matter in Law, that the Plaintiff had no Cause of Action, the Court gave Judgment against him; for the Obligation is void by the Letter of the Statute, for it makes void Obligations taken in another Manner, which extends to avoid Obligations for bailing those which are contained in the second Branch; as those in Execution, &c. *Plowd. 66, 67. Dive and Manningham.*

But as for the Conclusion of the Plea; the Condition was, That the Defendant should appear in B. R. to answer in a Plea of Trespass, and satisfy the Damages. The Defendant pleads the Statute of 23 H. 6. that the Bond was made for his Enlargement, and *Iffint non est factum*. The Plaintiff demurs specially upon the Conclusion of the Plea, which ought to be Judgment *Si Actio*, and agreed the Plea to be ill. *Allen p. 85. Leech and Davies.*

The Defendant and L. were jointly bound to Sir J. Lenthall for the true Imprisonment of W. and there was a Warrant of Attorney to confess Judgment on the Escape of W. Glyn moved to set aside the Judgment, being a Way for Ease only, and Judgment entred without Trial of the Escape. But *per Cur'*, It is to be entred on Action brought, which is brought, and the Parties are at Issue. But Sir J. Lenthall assigned his Security to the Creditor,

The Office and Duty of Sheriffs, &c.

tor, which *per Cur'*, is well enough; and there appearing no Fraud, they refused to set aside the Judgment. 1 *Keb.* 815. Sir John Lenthall versus Lord Landois.

The Rules
of the
King's
Bench
Prison.

The Marshal takes Bond of one in Execution to be a true Prisoner, who escapes; Action is brought against him, and well, for the Bond is good. The *Marshalsea* was ruled to be enlarged, and this shall be called *Within the Rules*; and if the Marshal take a Bond to tarry there, it is good. *Latch.* 143. Sir G. Reynell versus Elworthy, *Poph.* 165. *fine*, Sir G. Reynell's Case.

To save
from E-
scapes.

But a Bond to the Marshal, &c. to save harmless from Escapes is void, and within the Statute; because it is not a Bond that he shall continue a true Prisoner. *Vide* the Condition, Record and Pleadings. 1 *Sand.* 160, 161, 162. *Lenthall* and *Cooke.* 2 *Keb.* 422. *Id.* *Casus.*

Bond for
Cham-
ber-Rent
void.

The Marshal ought not to take Bond for Chamber-Rent; this is to come in in Allowance Fees. The Warden, or other Gaoler, cannot impose what Rents they will on Chambers. 3 *Keb.* 102. *Bond* and *Mosdale.* 3 *Keb.* 133, 603. *Duckensfield's* Case.

Bond for
Fees.

A Bond or Covenant for Fees is void; but a Bond for true Imprisonment is not void, *prima facie*, without Circumstances, &c. 3 *Keb.* 133. *Mosdale* and *Middleton.* *Vide antea* & *Dalt.* 524.

Cham-
ber-Rent.

A Bond for Chamber-Rent is void by common Law; because the Party is restrained *contra voluntatem*, and shall be imprisoned till Payment. Also the Statute extends to the Marshal only for such Bonds as they may take *Virtute Officii*, *Latch.* 10. *Epsom* Case. So for Meat or Drink. *Dalt.* 361.

Meat and
Drink.

Fees.

Upon a Statute acknowledged, and Extent sued; the Sheriff takes Bond of 20 *l.* for Payment of 10 *l.* his Fee; and this was before the *Liberate*. It's a void Bond. 1. Because he takes the Bond before the

the *Liberate*. 2. He took his Wages before he *Note*.
did his Work. 3 *Keb.* 678. *Ellis* and *Nelson*.

Vide infra Tit. *Fees*.

Debt was brought upon a Bond made to a Bailiff To save
of a Liberty to save him harmless, concerning Goods a Bailiff
which he had levied by a Warrant; and as the of a Li-
Goods of one *K.* and had delivered them to the berty
Defendant upon Request, who made claim to the harmless
Goods, and returned *Nulla bona*, &c. Defendant deliver-
pleaded in Bar *Non damnificatus*. Plaintiff re-ed.
plies, and shews how, and Defendant demurred.
It was hereupon insisted for Defendant, that the
Bond was against Law, because it was to save the
Plaintiff harmless from a false Return: But on the
other Part it was insisted, that the Bond was lawful;
and to prove it, several Authorities were cited; and
by the Opinion of the whole Court Judgment was
given for the Plaintiff. 1 *Lutwych* 593, 596.

Note, A Promise is within the Statute, as well as Promise
a Bond. But it is where the Bond or Promise is within
made by the Prisoner himself, or some other for him. the Sta-
And therefore in an Action on the Case the De-tute.
fendant promised the Plaintiff, That if *B.* (a Speci-
al Bailiff at his Nomination) arrested *A.* at his Suit
on *Cap' ad Satisfaciend'*, and suffered him to e-
scape, he would not sue the Plaintiff; this is not
within this Statute. 1 *Leon.* 132. *Palmer* and
Smalbrook.

But *Hobart* in *Norton Sim's* Case saith, Cove-Covenant
nant is not within this Statute; that is, because it
was not a Bond (for Performance) made in the Be-
half of a Prisoner, as *Beaufage's* Case is. *Hob.*
p. 13.

A Promise made to a Gaoler to suffer a Prisoner Promise
to go at large, is void. *Dalt.* 524. 2 *Bul.* 213. void.

As to *Assumpsits* and *Considerations* about deliver- *Assump-*
ing Prisoners in safe Custody, saving harmless from *sits, &c.*
Escapes

Escapes, permitting to go at large, &c. *Vide infra sub Tit. Escape, versus Finem.*

Where the Sheriff is not to take 60 or 40 *l.* Bail.

By the Statute of 13 Car. 2. cap. 2. Persons arrested by Process out of the *King's Bench* or *Common Pleas*, not expressing the Cause of Action in the Writ, Bill, or Process, and which areailable by the Statute of 23 H. 6. c. 10. shall give Bail-Bond not exceeding the Sum of 40 *l.* and upon Appearance at the Return, he shall discharge such Bail-Bonds. And if the Plaintiff do not declare before the End of the next Term after Appearance, then he shall be nonsuit, and Judgment and Costs shall be against him. But this Statute extends not to Arrests upon *Capias Utlagat'*, *Attachment* or *Rescous*, *Contempt* or *Privilege*; nor to popular Action, or Action on any Penal Law (except for Tithes), Indictment, or Information.

Exception.

Action lies.

Now if the Sheriff in such Personal Actions do take a Bond of 150 *l.* (where it ought to be but 40 *l.*) the Party shall have an Action upon the Statute against the Sheriff; but the Bond is not void.

Yet Bond good.

This was the Case of a Coroner. 2 *Keb.* 387, 311. *Foster* and *Closen*.

Caution.

And therefore *Villars* and *Hastings's* Case, where it saith, The Statute doth not restrain him from any Sum, is good Law; but with this Caution, That Action lies against him if he exceed 40 *l.* *de placito debiti* generally upon this late Statute. *Cro. Jac.* 286.

In what other Cases the Sheriff may bail, or not.

Felony.

The Sheriff cannot bail one committed for Felony. except it be by the King's Special Writ directed to him for that Purpose.

Indicted.

A Man indicted for Trespass, or any the like Offence, before Justices of the Peace, and thereupon committed to Prison, may upon the King's Writ be bailed by the Sheriff to appear at Sessions.

Upon

Ch. 7. Where the Sheriff was Bail.

143

Upon a *Supersedeas* the Sheriff may bail a Man *Supersede-*
fued or indicted, &c. whereupon a *Capias* or *Exi-as*.
gent shall be awarded against him, and the Party
thereupon imprisoned.

He may take Bail upon an Attachment, *pro Pa-* Attach-
ce, by the exprefs Words of the Writ. ment.

He may also take Bail-Bond on an Attachment *Salk. 608.*
for a Contempt; but the Plaintiff may refuse to ac-
cept it. And if he take insufficient Bail for an
Appearance, and the Plaintiff refuses it, he is liable
to an Action, and also to be amerced. *1 Salk. 99.* Amerced.

But in either Case, if the Plaintiff take an Assign-
ment of the Bail-Bond (tho' the Bail be insufficient)
the Sheriff is not to be amerced. *Ibid.*

C H A P.

C H A P. VIII.

Of Returns of Writs, and when they may be returned. General Rules and Maxims of Returns. What Writs must be returned, and what need not. What shall be a good Return of Writs, or how Returns shall be made, in Respect of the Person that makes the Return, as Sheriffs, Bailiffs of Franchises, &c. In Respect of the Forms, and where insufficient Returns are aided. Where Returns shall be void for the Uncertainty or Repugnancy. What shall be a sufficient Excuse for the Sheriff's Non-return of a Writ, and what not. What Acts, Process, or Appearance, shall be good before the Return. The Penalty on the Sheriff by the Court for Non-return.

Return,
what.

A Return is but a Certificate made by the Sheriff or Bailiff to the Court, from whence the Writ issued, of that which they have done touching the Execution of the same Writs. *Vide Dalt. 162.*

There is a Difference between the *Teste* and Return of Writs.

On the

Essoin-day. A Return may be on the *Essoin-Day*. A Writ shall not abate if the Return be *quarto die post*.

Appearance,

If a Man be bound to appear the first Day in Term in Court, he may appear the first Day of the *Essoin*, and then have his Appearance recorded, and this is good. 2 *Bulst. Bedoe and Piper.*

Where an ill Return shall be aided by the Party's Appearance, and where not, see *Cumberbach 293, 294.*

Fi. Fa.

Where 'tis necessary to return a *Fieri facias*, and where not. See 1 *Salk. 318.*

A Sci-

A *Scire Fac'* against Bail must lie in the Sheriffs Hands a convenient Time before 'tis returned, &c. See 2 Salk. 599.

Note, Where the Writ or Process is directed to the Bishop, there the Bishop is to make Return thereof: And so where the Writ is directed to other Persons (as Coroners) they are to make Returns. *Dalt.* 162, 537.

General Rules of Returns.

Deputies are allowed in Ministerial Offices: But all Returns made by them are to be made in the Name of the Principal Officer. 3 Bulst. 78.

The Sheriff must return true, and not contrary to the Record; if he do, it falsifies all his Proceedings. *L.* brought Trespass against *J. G. Widow*, hanging the Suit, she takes *D.* to Husband; Judgment was against *J. G.* and a Writ was directed to the Sheriff, *quod caperet J. prædictam per nomen J. G. ad satisfaciend'*, &c. the Sheriff cannot now return that she was married. *Cro. Jac.* 323. *Doley and White.*

The Return must not be contrary to the former Return. If the Sheriff return upon the *Venire fac'* of Jurors, twelve Jurors, upon the *Distringas* he may not return one had nothing, for this is against his former Return, 19 *H.* 6. 38. For if he had at first and alien since, yet it is chargeable with Issues. But if the Land be recovered by *Eign Title*, in the mean Time he may return it with this Conclusion, *Et issint nihil habet.* *Id. ibidem.* So if he had Land in the Right of his Wife, and she is dead in the mean Time.

The Sheriff is to put his Name to every Return made by him, or the Return is to be void. By the Statute of York, 12 Ed. 2. c. 5. 1 Bulst. 73. The
L Statute

The Office and Duty of Sheriffs, &c.

How.

Statute appoints that he who returns shall add his Name to the Return, and it is sufficient if it be his Christian Name and Sirname, and the Name of his Office is not requisite. *Cro. Car.* 189. *Bethell and Parry. Plowd.* 63. tho' in *Scrogg's Case, Moor* 548. saith, the Name of Office must be subscribed, as well as the Sheriff's Christian and Sirname, but by Coroners only the Name of Office. *Et vide Stile Pract. Reg.* 532.

What Names.

That 'tis requisite that the Sheriff in making a Return should insert his Title, Name of Dignity, Christian and Surnames.

By a Nuper Vic'.

The Return of the *Venire fac'* was *executio istius Brevis patet in quodam pannello huic Brevi annex'* Tho. H. *nuper Vicecom'*, and then the now Sheriff added these Words, *istud Breve sic indorsat' fuit mihi J. R. Vic' deliberat' per Tho. H. Mil' nuper Vic' in Executione Officii sui*; it's sufficient, for T. H. ought to put his Name to the Return: For *nuper Vic'* shews he was not then Sheriff, he ought to have put his Name to it T. H. and then the new Sheriff ought to subscribe *istud Breve sic indorsat'*, &c. *Plowd.* 63. 5 *Rep.* 41. 2 *Rol. Rep.* 209. *Bethers and Parry. Vide infra. Cro. Car.* 189, 190. *contra. Dalt.* 516.

Action against the Sheriff's Executors.

If the Sheriff levies Goods, and dies before Satisfaction to the Plaintiff, an Action of Debt will lie against his Executors. But where the Sheriff is chargeable in his Life-time for a special Tort or Mifeazance, there his Person is only chargeable; and *Actio moritur cum persona. Cro. Car.* 539, 540.

Returns according to ancient Course.

Returns must be made according to ancient Course, and according to Precedents: As Waste was assigned in S. the Return must not be *quod accessit ad S.* but *ad locum vastatum. Vide infra. 27 H. 8. Rol. 2. Dalt.* 162, 163.

So

So a Return of *non inveni partem* for *non est inventus*, is Error, and not amendable. 9 H. 6. fol. 12. Error.

Mercer was outlawed at the Suit of H. it was moved to avoid the Outlawry, because the Sheriff returned the Exigent on the Back of the Writ thus, (*viz.*) *superdictus Mercer*, where it ought to be *infranominatus Mercer*; for nothing was written above, but within. But by all the Justices the Return was good. So if he had writ the Return on the inner Side of the Writ. Dalt. 164.

Surplusage is no Hurt to the Return of a Writ, as in *Elegit*, and the Sheriff returns that to be executed; the Extent of the Church of St. Andrews, alias *dict' St. Edes.* and the true Name is *Andrews*, yet good. *Winch* p. 27. In *Scire fac'* returnable in B. If the Sheriff return *Scire fec'*, &c. *qd' sit coram vobis ad faciend'*, *qd' breve requirit*: Altho' *vobis* had Relation to the King, where the Garnishment ought to be *coram Justiciariis*, yet good; for these Words *ad faciend' qd' Breve requirit*, comprehend all. 29 Ed. 3. 33. adjudged every Return must exactly answer the Writ.

Statutes aid Misreturns and insufficient Returns, but not, where there is not any Return. Cro. Car. 587. Becknam.

None can make the Return of a Writ, but such Officer, a Person, who at the Time of the Return remains an Officer to the Court. Vide *infra*.

The Sheriff's Return cannot be falsified by *Affidavit*. *Comberbach* 255. Nor is his Return of a *Rescue* traversable. *Ibid.* 295. & *infra*. For against the Return of the Sheriff, there is not any Traverse, Averment or Answer. But this seems intended only of Returns of *Rescues*.

Per *Maynard* in *Searl and Long's Case*. *Mod.* Feigned Rep. 248. It's a great Abuse in Officers to return Returns feigned Names; the first Cause of which was the

Ignorance of the Sheriffs, who being to make Returns, and looking into the precedent Books for the Form, and finding *John Doe* and *Richard Roe* put for Examples, made their Returns accordingly, and took no Care for true Summoners and true Manuaptors. And he cited a Cause.

Judgment vacated.

Judgment was entred in *B.* in a Plea of *Quare Impedit*, upon Non-appearance to the grand Distress; but there the Party was summoned, and true Summoners returned. Upon Non-appearance an Attachment issued, and real Summoners returned upon that; but upon the Distress it was returned that the Defendants *districti fuere per Bona & Catalla, & Manuapti per J. Doe & R. Roe*; and for that Cause the Judgment was vacated.

Grand Distress.

Note, When the Grand Distress is awarded, it is that the Sheriff is commanded to seize the Thing in Question.

Rule to the Sheriff to return his Writ.

If the Defendant be taken, then at the Return of the Writ, the Plaintiff's Attorney, at the Day of the Return of the Writ, may give a Rule at the Clerk of the Rules for the Sheriff to return his Writ; or if he go out of Office, then a *Distringas* to the new Sheriff to distrain the old Sheriff to return his Writ: But if the Defendant be arrested by a Bailiff of a Liberty, who hath the Execution and Return of Writs, then he must return his Warrant back to the Sheriff by Rule of Court, or *Distringas* directed to the Sheriff to distrain the Bailiff, and so amerce the Bailiff that Way.

of

Of Returns in Respect of the Old Sheriffs and New Sheriffs.

Note, the Sheriff that begins an Execution shall end it, (and consequently make the Return) tho' his Office be expired. 1 Salk. 323. except the Writ endorsed with the said Return be delivered over to the New Sheriff. *Vide post.*

Upon the Cap' the Sheriff returns *Languidus in Prifona*, and a Distress issues to the New Sheriff to make the former Sheriff to have his Prisoner; and the new Sheriff returns Issues on the former Sheriff, and an *Alias distringas* issues against the Sheriff. And after one of the Counsel would have surmised, that the Sheriff against whom the Distress issued was dead. *Languidus in Prifona. Dalt. 516.* What must come in Way of Return.

But by the Court, he shall not have this by Way of Surmise, but it ought to come in by the Return of the Sheriff. *Dyer 25. a.*

The Return of the Old Sheriff shall not conclude the New Sheriff. On a *Fi' fa'* the Sheriff returned *qd' cepit bona ad valentiam 10l. & non invenit Emptores*; whereupon there went out to the new Sheriff a *vendition' exponas*, who returned that his Predecessor *non cepit bona, & ideo, &c.* and held good. 34 H. 6. Cro. Jac. 73. Dalt. 516. See before, and Chap. 2. and see after. *riff not concluded.*

Where and what Writs need to be returned, and where and what not.

Generally all Writs of Execution (except *Elegit*) *Ca. fa. Ha-* as Cap' *ad satisfaciend'*, *Habere fac' seisinam*, *Habere fac' possessionem*, *Fieri fac'*, *Liberate*, &c. which are the final Process, and after which no Judgment is given, nor further Process; and when Matters *en fait* are only to be done, as Land to be delivered, *Seisin. possessionem, Fieri fac.*

The Office and Duty of Sheriffs, &c.

livered, *Seisin* had, Goods sold, &c. are good, tho' the Writs be not returned or filed (if the Execution be duly made).

Elegit
must be
returned,
and why.

But in Case of an *Elegit* otherwise, because the Extent is to be made by Inquisition, to the Intent that the Court may judge of the Sufficiency of it, and every Inquisition ought to be of Record.

Cap' in
Process
must be
returned.

Capias in Process must be returned. 4 *Rep.* 67. *Fullwood's* Case; in other Cases the Party is at the End of the Suit; otherwise of a *Cap' in Process*, for the End of the Arrest is, that the Defendant shall appear. 5 *Rep.* *Hoe's* Case.

In a *Scire fa'* for Execution, it's a good Bar that the Sheriff levied the Damages by *Fi' fac'*, though he had not returned the Writ. *More* 468. *Hoe's* Case.

Rotorno
habendo.

The Writ of *Retorn' Habend'* is not returnable. 2 *Roll. Abr.* 434.

Haberefac'
seisinam.

The Sheriff was ordered to return an *Hab' fac' seisinam*, the Execution is good, if he do not return it. But perhaps a *Writ of Error* in Parliament may be brought; and if he will not return it, the Court shall amerce him. 1 *Roll. Rep.* *Godsall* and *Sir C. Heydon*.

Redisseisin
Post dis-
seisin.

The Writs of *Redisseisin* and *Postdisseisin* are *Vicountiels*, and not returnable; and the Sheriff shall hold the Plea, and give Judgment. 2 *Inst.* 82.

Admesur'
de pastur'
Dower.

So Writs of *Admeasurement of Pasture*, and of *de pastur'*, *Dower*, and the Parties may thereupon plead before the Sheriff in the County. But these Pleas may be removed out of the County Court by *Pone.* 2 *Inst.* 369.

Duces te-
cum.

Where the Sheriff returns *cepi corpus & paratum habeo*, and brings him not in, then the Writ of *Duces tecum* shall be awarded, to have the Body in Court *sub pœna.* 1 *Bulst.* 82. *Gerton's* Case.

Scire

Scire fac' issues out of Chancery to the Sheriff of Security H. and the Justices of Peace, to call L. before them of the Peace. to take Security of the Peace. L. enters into a Recognizance, and the Sheriff returns; this Matter is The Sheriff not to not good, the Justices should have returned too. return For the Viscount does not meddle with them as Separatim. Sheriff, but by Virtue of this Commission only. 21 H. 7. 20, & 21. 2 Roll. Rep. 257. Leonard's Case.

What shall be a good Return, or not; or how Returns of Writs are to be made; in Respect of the Persons that make, or ought to make the Return. As,

*Sheriffs.
Bailiffs of Franchises.*

Sheriffs.

If a Writ be directed to a Place where there are Where two Sheriffs, as London, Bristol, &c. and one of there are them doth return the Writ, its insufficient; for it two Sheriffs, and must be returned in both their Names, though one one returns the (according to Custom) may execute it. 21 Assize the Writ. 20. Br. Officer 22. Hob. 70. Dalt. 536.

But if a Warrant be directed to two Bailiffs of a Two Bailiffs of a Franchise to execute a Writ, the Return of one of Franchise the Bailiffs in the Name of both is sufficient. Tr. 39. El. Palmer and March. Cro. Eliz. 512. Dalt. 536.

If a Writ directed to the Sheriff be executed, and How the after a new Sheriff is chosen, the new Sheriff ought Sheriff to return the Writ in this Manner, (*scil.*) *Recepi ought to hoc breve Prædecessori meo directum sic indorsatum.* return the Writ Dalt. 516. 2 Roll. 457. *Vide antea.* executed in the

Time of the old Sheriff.

So of a
Bailiff of
a Fran-
chise.

So if, upon a Warrant directed to the Bailiff of a Franchise to execute a Writ, it be served; and after and before the Return of it, the Bailiff is removed, and a new Bailiff chosen, the Return to the Sheriff shall not be in the Name of the old Bailiff, but of the new Bailiff in the Manner afore-said; for the old Bailiff is now a meer Stranger. *Ibid.* *Quare*, for no doubt he is still liable for his own Neglects, &c.

How if it
be not exe-
cuted in
the old
Sheriff.

But if a Writ directed to the Sheriff is not executed by him before he is removed, and another chosen, and after the Writ is executed; this shall be returned generally in the Name of the new Sheriff, without any Mention of his Predecessor. *Dalt.* 517. 2 *Roll.* 458.

Simile of a
Bailiff.

The same Law is of the Bailiff of a Franchise. *Trin.* 39 *Eliz.* *Palmer* and *Marsh.* If a Writ be executed by one Sheriff, and before the Return of it a new Sheriff is chosen, he ought to return the Writ, and not the old Sheriff, because the new Sheriff is now the Officer of the Court.

Maxim, None can make the Return of a Writ but such a Person, who at the Time of the Return remains an Officer to the Court.

Nuper vic'

A *Venire* was returned in this Manner: *Per T. R. Vicecomitem. Istud breve cum pannello annexo mihi deliberat' fuit per Thomam Hanmer Militem, nuper Vicecomitem in exitu ab Officio suo. Et sic indorsatur, Thomàs Hanmer Miles, nuper Vicecomes.* It was assigned for Error, in that it appears it was returned by one who had no Authority; for in saying *Nuper Vicecomes* excludes him, and that he was not Sheriff when he made the Return.

Per Cur', It's good; for it appears by the Record that he was Sheriff next before *Thomas R.* and this Word *Nuper Vicecomes* indeed doth necessarily imply,

ply, that he was not then Sheriff at the Time of the Delivery of the Writ to the new Sheriff; then it must be construed, that by the Word *Nuper Vicecomes*, he was Sheriff at the Time of the Panel made; and if he had returned it without the Word *Nuper Vicecomes*, it had been good. *Cro. Car.* 189. *Bethyll* and *Parry*.

The Record is, That the *Venire fac'* to try the Error Issue was returned by *J. S.* Sheriff of the County that *J. S.* of *D.* It was assigned for Error, that *J. S.* was ^{was not} not then Sheriff of the said County. And it was ^{then Sheriff.} certified by a Record under the Seal of the *Exchequer*, (*viz.*) That he was Sheriff; upon which the Judgment was affirmed. But some are of Opinion, that this cannot be assigned for Error against the Record of the Court. *Mich. 11 Car. B. R. Smith* and *Smith*.

If the Writ be returned by one that was not Where Sheriff, it's a manifest Error; but if the Defendant Appear- appear afterwards and plead, it's no material; for ^{ance} his Appearance hath made it good. *Cro. El. p.* ^{cures the} *582 Thoroughgood* and *Scroggs*. ^{Return.}

If the Sheriff shall return *Mandavi ballivo Liber-* ^{Return} *tatis*, and shall not therein set down the proper ^{to Mandavi ballivo,} Name of the Bailiff, it's not good. ^{&c.}

The Sheriff cannot serve a Writ in Part, and ^{Not Part} write to the Bailiff of a Liberty to execute the o- ^{by She-} ther Part; as a Writ served as to Part of the Jurors. ^{riff, and} But if the Sheriff upon a *Capias* in Debt against ^{Part by} three, return that he had taken two, and as to ^{Bailiff,} the other *Mandavit ballivo Libertatis*, &c. ^{Liberty.} good.

The common Form of *Vic' Ret'* is, *Feci quod-* ^{Common} *dam Warrant'*; but to the Bailiff of a Liberty, ^{Form.} *Mandavi*, &c. 2 *Roll. Rep.* 263.

Præcipe quod reddat was awarded *Vicecomitibus* ^{Sheriff} *Glouc'*, *versus* *A. B. & C.* The Sheriffs return, ^{cannot} that the said *C.* was one of the Sheriffs of the said ^{return.} City. *Ideo ego præfat' C. & c. alter Vicecom' Civi-* ^{He sum-} *moned* ^{tat' himself.}

The Office and Duty of Sheriffs, &c.

tat' prædict' meipsum secundum Exigentiam brevis istius summonere non possum. Respons. It was adjudged a good Return. *Bendl. n. 160.*

The Return was in this Form, upon a Writ of Entry against *Edw. Mytchell, Thomas Wykes* and others.

Simile.

Summ' infranominat' Edward Mychell, R. Fenn & J. Denn, & quoad summ' prædict' Tho. Wykes, Justiciar' infrascript' Certifico qd' idem Thomas, & ego Tho. Wykes jam unus Vicecomit' Civitatis prædict', sum unus & idem, & non alius neque divers'. Ideo ego præfat' Thomas & Hugo Hyde alter Vic' Civit' prædict' meipsum secundum Exigentiam brevis istius summ' non possumus. Respons. prædict'. Thomæ Wykes & Hugonis Hyde Vic'. Anderson 110. n. 21. Dalt. 193, 194.

Bailiffs of Franchises, vid. supra.

Retorn' de Vic' per Bailiff.

The Sheriff cannot return a Mandamus upon a Writ of Inquiry, &c. directed to himself to be executed. If a Writ to enquire of Damages be directed to the Sheriff, he ought not to make such a Return, That he had commanded such a Bailiff of such a Liberty, &c. *Cui executio prædict' brevis totalit' restat fienda, & quod alibi infra Com' prædict' per se fieri non potuit, qui quidem Ballivus sic sibi respondet,* and so sets down an Inquisition before the Bailiff, and 40 *l.* Damage. This Return is erroneous, untrue, and against Law; because the Warrant was directed to the Sheriff himself to be executed in any Part of his Shire, and no *Venue* contained in this Inquest of Office, as there is in other Writs which entitles the Bailiffs of Liberties. But because there were divers Precedents of this Form, the Court would not reverse it. *Hob. p. 83. Virely and Gunstone.*

If the Sheriff return, That the Bailiff of a Franchise (who had Return of Writs) had returned, &c.

Ch. 8. Of Sheriffs Returns.

155

&c. this is good, although he doth not shew of what Place he is Bailiff. 29 Ed. 3. c. 1.

W. had a *Cap. ad satisfac.* to the Sheriff of *Mid. New Pro-*
dlessex, and makes Precept to the Bailiff of the *cess, be-*
Dutchy, and the Precept was *Ad capiend' H. ad re-* cause the
spond' W. where it should be *Ad satisfaciend'*, and Return
the Bailiff returns the Precept served, and the She- was mi-
riff returns to the Court *Cepi corpus secundum Exi-* staken.
gentiam brevis; it was moved to have a new *Cap'*
ad Satisfaciend' against *H.* For tho' the Sheriff by
his Return had charged himself to the Plaintiff, so
that he may demand Execution against him; yet
where in Truth the Defendant was never taken in
Execution for the Debt, as here, but only taken
ad respondend', there the Plaintiff is at Liberty to
take new Process against the Defendant, which the
Court granted. *Yelv. 52. Wood and Harborn.*

Precedents.

Mandavi ballivo qui nullum dedit responsum. 2
Sand. 99. Jaques and Cæsar.

Mandavi ballivo upon Fieri facias, and upon
Non omittas awarded. Vic' ret' nulla bona. 1 Sand.
305. Merchant and Driver.

The Form.

What Returns shall be good in Respect of the Form,
or not; and where insufficient Returns are aided.

As to the Sheriff's setting his Name to the Re-
turn, *vide supra.*

Sometimes the Return is insufficient for Omission *Omission.*
of Words: As where the Return was, *Residuum*
hujus brevis apparet in quadam Scheda, for *Resi-*
dum executionis hujus brevis. Fitz. Ret. 14.

And

Scire fac
School-
Master.

And the Sheriff is bound to take Knowledge of the Law in making his Return; therefore in a *Scire facias* to *L. B. Master of the Grammar-School of S. &c.* and to the Scholars of the same, he returned that *Scir' fecit* to the Master, and doth not say, To *L. B. Master. Bro. Ret. 88.*

In a *Scire fac.* the Sheriff returned *Scire feci A. B. modo & forma prout istud breve exigit & requirit*, and said not *infranominat'* *A. B.* yet *per Cur'* it's good, for these Words *prout hoc breve exigit* are Tantamount. 2 *H. 4. 13.* 3 *H. 4. 9.*

Return The Sheriff returned *Non inveni*, for *Non est in-*
Noninveni *ventus*, and the Party thereupon was outlaw'd
is Error. This was assigned for Error, and not amendable.
Fitzh. 19.

A Return A Return by the Sheriff in the third Person is
in the 3^d not a good Return. The Sheriff returned, *Quod*
Person *præcepit ballivo de S. for Præcepi ballivo*, and he
not good. was amerced for it. 21 *Aff. 17.*

Rescous The Sheriff upon a *Capias* returned, That he
returned. arrested the Defendant at *S.* and would have carried him to the Gaol, and *A. B.* rescued him. This Return was insufficient, because he did not shew at what Place *A. B.* made the Rescue; for it shall not be intended the Place where the Arrest was. *Bro. Ret. 97.*

Vide plus Tit. Rescous.

Prox' futur' The *Teste* of a Writ was 2 *Martii 11 Eliz.*
tur', how The Return was, *In quarta Septimana Quadrige-*
to refer. *sima prox' futur'*. The Words *prox' futur'* refer to
quarta Septimana, not to *Quadragesima. Mo. 365.*
Barton and Lever.

That the In *Trespas* the Sheriff returned in the Common
Defen- Bench, that the Defendant was attached *per catel-*
dant was *la ad valentiam de 10 l.* It's a void Return, for
attached *he ought to return he was attached by one Beast*
per, &c. or Chattel certain, and name them, that so they
how to be returned. may

Ch. 8. Of Sheriffs Returns.

157

may be forfeited. Cro. Eliz. 13. Lawrence and Nethersole. 1 Andersf. 51. Vid. Tit. Attachment.

In Outlawry of Murder the Sheriff returns, *Ad Comit' meum tent' apud D. en le County de Northumberland, and saith not in Comit' meo Northumbriae tent', &c.* It's Error, for one may be Sheriff of Cambridge and Huntingdon, and of Surrey and Sussex. 2 Roll, Rep. 52. Alder's Case.

Action of the Case upon Escape of one taken Time, by *Ca. sa. ret' Pascha* 16 Car. 2. on a Judgment (*viz.*) entred in *Mich.* 16 Car. 2. which is repugnant and impossible; and this moved in Arrest of Judgment on the Return of a Writ of Enquiry. But the *Teste* appearing to be *Jan.* 16. Car. 2. *ret' Craft' Ascen'*, and that *Virtute brevis postea & antea retorn'*, (*viz.*) such a Day of *May* 16. which should be 17. *Per Cur'*, This is a void Return, (*viz.*) being expositive only. 2 Keb. 101. Hammer and Unit.

Where a Return shall be void for the Incertainty or Repugnancy, or not.

In a Replevin on the *Causam nobis significes*, if the Sheriff return, That the Beasts cannot be delivered, *quia visum inde habere non potuit.* This is not good, because he doth not say *accessit ad locum*; for perhaps he could not have the View, because he did not go where the Beasts were. 2 Ed. 3. 54. b.

Outlawry was reversed, because the Exigent had an uncertain Return. 2 Rep. Dr. Druy's Case 141.

If a *Capias* comes to the Sheriff to take a Man, it's no Return that he was found within his Bailiwick after the Delivery of the Writ, *Prout sibi constare poterit.* This is not good, but he ought to

Uncer-

tain Re-
turn of
the Exi-
gent.

*Prout sibi
constare po-
terit, &c.*

to

to return expresly, *Quod non est inventus.* 9 H. 6. 57.

Simile.

So in a *Fieri fac' de bonis Testatoris* against Executors, if the Sheriff return that they have not any Goods in *balliva sua*, after the Delivery of the Writ *prout ei constare poterit.* This Return is not good; for he ought to take Notice whether they had Goods or not, and so return it. 9 H. 57. b.

Return
on Affets.

But in Debt against an Executor, who pleads *plene Administravit*, and Affets are found; upon a *Fieri fac'*, the Sheriff returns that he had nothing within the same County; it's a good Return. *Ben-dloes, n. 91.*

Uncer-
tain.

Upon *Habere fac' seisinam* the Sheriff returns, that the Party who ought to take the Seisin, *non prosecutus est breve.* This is not good; for the uncertain Intendment of it, and the Coming of the Sheriff to have Seisin, is not properly a Prosecution of the Writ. *Pasch. 15 Jac. Floyd and Bethell.*

Repug-
nant.

On Entry *sur disseisin* of two Acres, *Hab' fac' seisinam* was awarded. The Sheriff as to one Acre returns *Habere feci*, as to the other *Tarde*; the Sheriff shall be amerced for such a Return, as being contrary and repugnant in it self. As in *Ca. fa.* against two, the Sheriff returns as to one, *Cepi*, and as to the other, *Tarde*; he shall be amerced. 2 Leon. 175.

Vide Rescous.

What shall be a good Return against the Admittance of the Party, or not.

In Debt
against
the Heir.

Debt against the Heir: If the Defendant pleads, Nothing descends to him but an House in *B.* upon which Judgment is given for the Plaintiff; *sed quia ignoratur* of what Value the House was, a Writ issues to the Sheriff to enquire of the Value, and according to that to make Execution; and the She-
riff

riff returns, That the Heir sold the House before the Writ came to him. This is not a good Return.

Hen. 7 Jac. B. R. Goldson and Bennet.

If in Action of Debt against Executors the Defendant acknowledgeth the Action, on which a *Fi-eri fac'* issues, the Sheriff may return *Nulla bona*, &c. for this stands with the Judgment, inasmuch as he confessed the Action; but not that he had Goods. 2 Roll. Abr. 459. Newman and Babington. Ha' fa' against the Executor.

Upon *Habere fac' seisinam*, upon a Judgment against J. S. it is no good Return for the Sheriff to return, That J. S. had nothing in the Land, nor was Tenant. 17 Ed. 3. 66. b.

The Sheriff on *Levari* returns, That he had levied the said Sum (which was 2000 l.) and in Debt pleads he pleads as to 308 l. *Nil debet*, and as to the rest a Release from the Plaintiff; the Plaintiff demurs. Now the Plea of *Nil debet* is ill, and the Sheriff is estopt to plead it; for it is contrary to the Return. Estoppel. But *per Cur'*, since they have not relied upon the Estoppel, but taken Issue, that could give them no Advantage. Hob. 206. Speake and Richards.

What shall excuse the Sheriff for his not Returning, and what shall not.

As for the Sheriffs returning a *Rescous*, vide sub Tit. *Rescous*.

The Sheriff returned a Resistance on *Habere fac' seisinam*, and he was amerced 20 Marks; because he did not take the *Posse Comitatus*, and an *Alias* awarded. Hill. 19 Ed. 2. Execution. 147.

On *Habere fac' seisinam*, it's a good Return to excuse the Sheriff, that he at all Times was ready to deliver *Seisin*, and appointed divers Times in certain for the Party to come to the Land to receive *Seisin*; but none comes for the Party to receive it. That none came to make *Seisin*. 2 Roll. Abr. 459. Floyd and Bethell.

So

So he ought to excuse himself from the Time before the Day aforesaid, otherwise the Return is not good; for peradventure he was requested before, and would not perform it. *Mesme Case.*

That he is not paid his Fees. It is no good Return for the Sheriff to say, That the Party will not pay his Fees, and therefore that he would not execute the Writ. 34 H. 6. Bro. Ret. 10. The very Words of the Writ do enjoin the Sheriff to make Return of it; and if he be not paid his Fees where he is allowed to take them, he may recover them by Action.

Tho' inferior Court be not bound to allow a Writ, yet they must return. If a Writ out of the *King's Bench* be directed to an inferior Court, which the inferior Court is not bound to allow, but may proceed notwithstanding the Writ directed to them; yet they ought to make a Return upon the Writ, and in the Return to shew the Cause: For the Writs from above ought to be obeyed. *Stile's Pract. Reg. Tit. Return.*

Sheriff cannot return a Protection on Arrest. Sheriff returned a Protection on Arrest. It was set aside *per Cur'*, in Regard the Sheriff can return nothing but *Non est inventus*, or *Cepi corpus*, at his own Peril; and it's in his Discretion to allow or disallow any Protection, and the Sheriff was ordered to return his Writ on a Pain. 2 Keb. 681. *The Sheriff of Yorkshire's Case.*

May return a *Superfedeas* with the Body. If a Man be taken in Execution at the Suit of the King; afterwards a *Superfedeas* comes to the Sheriff, by 2 H. 7. fol. 7. he may return the *Superfedeas* with the Body.

What if the Party discharge him. So the Sheriff is to return the *Capias* and the Body at the Day; but if the Party discharge him, this is a good Excuse. 3 Bulstr. 96, 97.

Property. And Note, if a Writ can't legally be executed the Day on which 'tis returnable, it shall not the following Day, or, at any Time after. 6 Mod. 159. In Repevin if the Sheriff returneth, That the Defendant claimeth Property, it's a good Excuse. *Dalt.* 181.

The

The Sheriffs of London may return their Custom. Custom.
Dalt. c. 73.

Mandavi ballivo Libertatis, qui nullum dedit responsum, is a good Return to excuse.

Tarde is an Excuse,

So, that the Plaintiff *non invenit plegios de prosequendo*.

Amendment.

Where Amendment shall be of Sheriffs Returns, and where not.

On *Venire fac'* no Return was indorsed, nor any *Venire*. Name of the Sheriff on the Back of the Writ, *nec quod executio brevis patet in quodam pannello*, &c.

The 18th of *Eliz.* aids insufficient Returns, not *De novo*. where there is no Returns; and it could not be amended after Verdict, and a new *Venire fac'* issued. 5 Rep. 41. Rowland's Case.

8. H. 6. c. 12. extends to Returns; but yet Misprision of Clerks are only to be amended. ^{on.} But it extends not to a Return by the Sheriff where it should be to a Coroner; nor doth 18 *Eliz.*

Nor to a Return of a *Venire fac'* without the *Ve' fac.* Name of the Sheriff. *Vid. plus Co. 8 Rep. 162.* Blackmore's Case.


The *Venire fac'*, and other Process, is directed By one *Viccomitibus de Canterbury*, and the Return is Sheriff made by one Sheriff only. The Court amended only. this at common Law, and not upon the Statute of *Jeofails*, as was *Sherrington* and *Talbot's Case*, 1 Cro. . . . and 39 H. 6. 40. And they swore the Jury here, that there was but one Sheriff in *Canterbury*. *Siderfin p. 243. The King and Percival.*

*Album
breve.*

Album breve returned is not amendable. *Mo. Rep.* 1196.

Where the Return of the Sheriff shall be amended, as well after Verdict as before. *Vid.* 10 *Rep. Denbaud's Case.*

Vide hic sparsim plus de Amendments. And see General Abridgment. Tit. *Amendment.*


Where
the She-
riffs re-
turn no
Writs,
&c.

Having now treated largely of the Insufficiency and Validity of Returns in General, I shall consider how the Law is in Cases where the Sheriff doth not return the Writ; or what Act, Process or Appearance, shall be good before the Return, and the Penalty on the Sheriff for not Returning.

As to not returning of *Execution*, *vide infra.*

Inheri-
tance.

Where a Man is to lose an Inheritance if he do not appear, he shall appear without the Return of the Sheriff *gratis*, by Day in the Roll. 10 *H.* 7. 11.

Corporal
Pain.

Where a Man is to have a corporal Pain if he doth not appear, he may appear without the Return of the Sheriff *gratis*. *Id* *ibid.*

Exigent.

In Trespass; if after the *Exigent* is issued, the Defendant renders himself and had a *Superfedeas*, he may appear by the Roll, although the Sheriff doth not return the *Exigent* at the Day. 38 *Ed.* 3. 20. *b.*

Debt.

In a Writ of *Debt*, if no Original be returned, nor any Return made, yet the Defendant may appear by the Roll. 29 *Ed.* 3. 18.

Upon a
Nihil.

In a Writ of *Debt*, if the Sheriff return the Original *Nihil*, &c. yet the Defendant may appear for fear of a *Capias*. 10 *Jac. B. R. Slaney and Vautrey.*

The Penalty for not Returning.

Nota pro Regula, by *Hales* : (1) The Court will discharge Prisoners on common Bail in two Terms. (2) They will inflict Penalties on Sheriffs, for not making Deputies; and will (whether in Office or not) imprison them for not returning of Writs by the Day, and not leave them to Amerciements, or *Distringas nuper Vicecomit'*. 2 *Keb.* 812. Penalties on Sheriffs.

In 1 *Bulstr.* 201, 202. an *Habeas Corpus* was directed to the Warden of the *Fleet*, to bring in the Body of a Prisoner in his Custody; who refusing to make his Return, another Day was given him upon Pain to return the Body. Warden.

If the Sheriff takes *J. S.* upon a *Latitat* or *Ca-Action*, *pias*, and doth not return the Writ, an Action lies against him.

And *Note*, tho' a Sheriff be out of Office, yet if it appears, That during his being in Office he has made a false or fraudulent Return, or wilfully refused, neglected or delayed the Execution or Return of a Writ, the Court will send for him into Custody, or order an Indictment or Information against him. See 2 *Show.* 87. a Sheriff laid by the Heels for not returning a *Fi' fa'*. See Indictments against Sheriffs *Tremain* 123. & *Offic' Cler' Pacis*, 152. 158. 213. *post.* 174.

C H A P. IX.

Remedy against the Sheriff for a false Return: Where and in what Cases, and what Action lies against him for a false Return. Where such Actions are to be brought, how to be laid, and the Manner of declaring therein. Of the Reason of the Return of Cepi Corpus upon Bail taken. Where Action lies against the Sheriff or Bailiff of a Franchise, and which of them upon a false Return. Remedy against the Sheriff for not returning the Writ; or against his Bailiff, or against the Bailiff of a Franchise. Of laying the Action, and of the Declaration thereon. Where, and in what Cases a Man may traverse the Sheriff's Return, or not.

FOR Remedy against Sheriffs, Bailiffs and Gaolers, and where the Action is to be laid as to *Misfeazance, Nonfeazance, Faux Returns and Non-returns.* *Vide Stat. W. 2. c. 9.*

For Misfeazance.

Faux Return. 1. *For a Faux Return; where and in what Cases Action lies, and where not; and where and how such Actions are to be brought, and the Manner of Declaring therein.*

Summoned. In Partition, or other real Action, if the Sheriff return the Tenant summoned, when in Truth he was not, Action of *Deceit* lies against him. 26 *Ass.* 48. 1 *Brownl.* 157.

So in a real Action, if the Demandant deliver a Writ of *Summons* to the Sheriff, and the Sheriff summon the Tenant accordingly, and after does not re-

return the Writ, *Action on the Case* lies against him. *H. 32 El. B. R. Marsh and Astery.*

So if the Sheriff return one summoned or proclaimed, which is not, *Action on the Case* lies; but this is not assignable for Error. *Mo. 349. Corbet and Marsh.*

Action on the Case lies against the Sheriff for re-Delivery turning, That he had delivered to the Plaintiff, on Inquisition taken, where he refused to deliver it, and so the Return is false; tho' it was objected, that perhaps the Possession is kept against him *manu forti*. But *per Cur'*, that is but Mitigation of Damages; but his Return was false, and therefore the *Action* lieth. *1 Roll. Abr. 738. Lister and Bromley.*

If the Sheriff return *Exigent 3 aut 4 exact'*, and *Exigent*. that there were not more Counties, where in Truth there was a fifth County, the Plaintiff shall have *Action on the Case* against him. *9 H. 6. 60. b.*

Sheriff arrests the Party, and yet returns *Non est inventus*; *Action on the Case*, or *Trespass* for false Imprisonment lies against him; for he is a Trespasser *ab initio*. *Cro. El. 729. Hawkins's Case. 18 Ed. 4. 18.*

Action on the Case was against the Sheriff, for *Cepi Coram* that he arrested *J. S.* and set him at large, *absque p^{us}* on *aliqua securitate inventa* for his Appearance, and at the Day returned *Cepi Corpus*, and that the said *J. S.* did not appear at the Day, but hid himself; and that upon an *Habeas Corpus* awarded, he returned *Paratum habeo*, which was *Faux*, whereby the Plaintiff was delayed in his Suit, &c. The Defendant pleaded, That *J. S.* being arrested, put him in Sureties for his Appearance, *J. N.* and *J. D.* who are Persons of sufficient Estate within the County, and were bound to him in 40*l.* for Appearance of *J. S.* at the Day in the Writ mentioned, and pleaded the Statute of 13 *H. 6. c. 10.*

The Office and Duty of Sheriffs, &c.

by Reason whereof he let him at large, and traverseth *Absque hoc* that he let him at large, *absque aliqua Securitate inventa prout, &c.* Cro. El. 624. Barton and Aldworth.

The Court held the Plea and Traverse to be good; for he is by the Statute compellable to take Bail, and it's left to his Discretion what Bail to take: And altho' he had not the Body at the Day, and afterwards at the Day of the *Habeas Corpus* returned *quod paratum habeo*, when he was at large, that is a Contempt to the Court, and finable; but it's nothing as to the Party, nor can he take Advantage of it.

Upon Bail, Sheriff not charged returning *Cepi Corp.* So that the Law which has been disputed is settled, That where the Sheriff takes Bail according to the Statute of 23 H. 6. and returns *Cepi Corpus*; tho' the Party do not appear at the Day, yet the Sheriff shall not be charged in an Action on the Case for a false Return. *Siderfin* p. 22, 23. *Allen* and *Robinson*. Mo. n. 590. *Langton* and *Gardner*.

23 H. 6. 10. A General Law in some Cases. For the Statute of 23 H. 6. is a general Statute, of which the Judges shall take Notice; but if it does not appear to be a Return within the Statute, but at Common Law, there for his Non-appearance Action lies. And there is a Case in *Siderfin* on this Point which is worth Observation, as to laying the Action and Pleading.

Cepi Corp. on Stat. Action on the Case was brought for a false Return, *i. e.* *Cepi Corpus*, and yet he had him not at the Day, but suffered him to escape. The Defendant demurs to the Declaration. Now the Action is good, because the Declaration shall be taken to be true upon this Demurrer. And the Statute of 23 H. 6. is in Part a private Statute, and the Court will not take Notice of it without Pleading it. But had the Defendant pleaded it Specially, or had he pleaded Not guilty, he might have had Advantage of this Statute, and have ousted the Plaintiff of
of

of his Action. After the said Statute the Sheriff cannot make a special Return, but *Cepi Corpus*, or *Non est inventus*. So that the Case of *Allen* and *Robinson* as to that Point, is good Law. For such Action lies not properly against the Sheriff, because the Statute of 23 *Hen. 6.* compels him to bail the Prisoner; and yet the Sheriff shall return a *Cepi Corpus*, as formerly. *Siderfin* p. 439. *Parker* and *Welby*.

Now it's said in *Benson* and *Welby's* Case, That 23 *H. 6. c. 10.* is a private Statute, and ought to have been pleaded. 2 *Sand.* 154. *Benson* and *Welby*.

Now that Statute, as *Whelpdale's* Case is, is a private Law as to Sheriffs Bonds; but as to extor-
 How pub-
 tick.
 tious Fees, it's a publick Law. 2 *Keb.* 626, 657.
Mod. Rep. 33. *mesme* Case.

If a Sheriff levy Money on a *Levari facias*, up-
 on a Recognizance. at the Suit of *J. S.* and re-
 turns the Writs served, *J. S.* may have Debt a-
 gainst the Sheriff, or against the Sheriffs Execu-
 tors. But in this Case the Plaintiff demurred to
 the Defendant's Plea, and concluded ill. The
 Plea was grounded on a Release, and he should
 have demanded Judgment, if the Defendant should
 be admitted to plead a Release made after the
 Sheriff had made his Return. 1 *Roll. Abr.* 518.
Speak and *Richards.* 1 *Brownl.* 57. *mesme* Case.
Hob. p. 206. *mesme* Case.

Action on the Case lies against a Sheriff, who
 accepts of a Return of one that is not Bailiff, and
 against him that made the Return. *Mo.* 431. *Pal-*
 mer and *Smalbate*.

Action on the Case lies against the Bailiff of a
 Franchise for negligent Execution, or a false Return.
Mo. p. 431.

Action on the Case lies against a Sheriff for
 making other Return than is returned to him by
 king o-
 a Li-ther Re-
 turn.

a Liberty or Bailiff of a Franchise, who had *Retorna Brevium*. 1 *Roll. Rep.* 119.

Where the Action lies against the Sheriff or Bailiff of a Franchise on a false Return.

Upon a *Fieri fac'* against an Administrator, the Sheriff makes a Warrant to the Bailiff of a Franchise to execute it, and after the Bailiff is remov'd, and another Bailiff elected; and after the old Bailiff returns in his own Name to the Sheriff, That the Administrator had not any Goods *praterquam*, &c. which is false, and after the Sheriff makes Return accordingly to the Court; yet no Action on the Case for this false Return lies against the Bailiff. For the Return ought to have been made of the new Bailiff, and so the Sheriff had accepted a Return from one as it were a meer Stranger, and so void. And he ought to take Cognizance of the right Ministers of Law; and therefore the old Bailiff for this false Return is not punishable by the Law, but the Sheriff. 1 *Roll. Abridg.* 99. *Palmer and Marsh.*

False Return of Bailiff. *Lib.*

If the Sheriff return *Mandavi Ballivo Libertatis*, &c. *qui mihi responsum dedit*, &c. if the Matter of the Return be false, no Action lies against the Sheriff, but only against the Bailiff: For the Sheriff ought to accept the Return of the Bailiff, and not examine the Reality of it, (if it be sufficient in Law). 1 *Roll. Abridgm.* 98, 29. *Palmer and Marsh. Cro. El.* 512. *Palmer and Potter.*

Against the Sheriff for a Return by one who is not Bailiff of a Franchise.

If a *Venire fac'* comes to the Sheriff in a *Quare Impedit*, and the Sheriff command the Bailiff of the City of C. to return the Pannel, who does it accordingly, where he had not any Warrant to do it, not being Bailiff of a Franchise, whereby the Panel is quash'd. The Plaintiff for this Default in the Sheriff, and for his Damages, shall have an Action on the Case. 38 *Affize* 13.

Against the Sheriff and not against the Bailiff.

The Sheriff upon a *Fieri facias* against *J. P.* makes a Warrant to *J. S.* to execute as his Bailiff, and he does it; and afterwards the Sheriff makes a false

a false Return, (*viz.*) That the Writ came *Tarde*, &c. by which he is a Trespasser *ab initio*, yet it makes not the Bailiff a Trespasser. 2 *Rol. Ab.* 562. *Parker and Mosse.*

It was the Opinion of all the Judges in the Sheriff Case of *Fawcett and Cotton*, That the Sheriff's submits to Submission to a Fine, is no Conclusion to the Parties grieved, to bring their Action for the false Return of the Sheriff, if it were so. *Sir Thomas Jones pag. 39.*

In Return on *Elegit*, the Sheriff returns, That Case, and he had appraised the Goods in *Specie* to 40 *l.* and not Debt, extended such Lands, and delivered them to the Plaintiff. *Ubi revera* he never delivered them to the Plaintiff. Action of Debt lies not in this Case, but Action on the Case; for it is no Debt in the Hands of the Sheriff. *Cro. Jac.* 566. *Coryton and Thomas.*

And it's not like to *Pyke's Case*, 14 *Jac.* which Debt was; the Sheriff on a *Scire fac'* returned, That he had sold the Goods for so much Money, and delivered the Money to the Plaintiff; and the Plaintiff thereupon averring that he had not the Money, maintained an Action of Debt; For there the Sheriff confessed by his Return, That he had sold the Goods, and delivered the Money; but here it is not returned, that he meddled with the Goods, or the Value of them, so as there is not any Certainty to charge him. *Pyke's Case.* 14 *Jac.*

Where the Action is to be brought.

Action for a false Return may be brought in *In Com'* the County where this was, or in *Middlesex* where or where the Record is. *Cro. Jac.* 532. *Parkhurst and Powell.*

So

Wales.
At *West-*
minster.

So Escape at *D.* in *Wales*, and the Return was *Non est inventus*, and it was tried at *Westminster*, the false Return being made at *Westminster*, which is the Cause of the Action. 2 *Keb.* 362. *Mancer* and *Smith*.

Utlagat'
Com' or
Middlesex.

If a Sheriff on *Cap' Utlagat'* will not arrest the Party, but return *Non est inventus*, an Action may be brought against him in the County where he received the Writ, or in *Middlesex*, where the Record of that false Return is, at Election. *Hob.* 209. *Siderfin* p. 218, 219. *Russel's Case*.

Elegit.
Com' or
Middlesex.

A Doubt was, Whether Action on the Case for a false Return on *Elegit* lies in the County where the Return of the *Exigent* was, *i. e.* in *Middlesex*, or where the Land lies? And the Court inclined, That it lay most properly in *Middlesex*. *Winch* p. 100. *Sheir* against Sir *Francis Glover*.

Debt in
Com' Pal.

One brings Debt against *B.* Sheriff of the County Palatine of *Lancaster*, and sues him to Outlawry on *Mesne Process*, and had a *Capias* directed to the *Chancery* of the *County Palatine*, who make a Precept to the Coroners of the County, being Six, to take his Body and have him before the Justices of the Court of Common Bench at *Westminster*; one of the Coroners being in Sight of him, and having a fair Opportunity to arrest him, does it not, but they all return *Non est inventus*. The Plaintiff

Ret' Non
est invent.
Action in
Middlesex.

hereupon brings his Action against the Coroners in *Middlesex*; and the Court inclined, That the Action is well brought in *Middlesex*; because the Plaintiff's Damages arise here, by not having the Body here at the Day. *Bulmer's Case*. *Rep.* and *Dyer* 159.

Action
lies not
against
one Coro-
ner.

The *Chancery* returns to the Court the same Answer that the Coroners return to him, so that the false Return is the Cause of Prejudice, and the

the other Things are but Arguments to prove it. And the Court conceived an Action would not lie against one Coroner, no more than against one Sheriff of London, York, &c. *Mod. Rep.* 198. *Naylor and Sharpley.*

Of Declarations in Actions for false Returns.

In *Pigot's Case* it was alledged for Error, that *Non est inventus.* the Declaration was naught :

1. The Bond was made for 200 *l.* dated 29 ^{Process} *August*, 13 *Jac.* and this was before the Bond ^{before the} made ; yet being returnable in *Michaelmas* Term, ^{Bond} and the *Latitat* upon it after the Bond, it's sufficient to maintain the Action, and the Process always bears *Teste* the last Day of the Term before.

2. The Declaration is, The Sheriff's Bailiffs arrested the Party, and the Sheriff falsely returned *Non est inventus.* It was alledged for Error, that the Declaration was not good, because he doth not ^{the Defendant} shew that the Bailiffs delivered the Bond to the Sheriff, which they had taken for his Appearance ; nor is it shewed, that the Defendant did not appear. *Sed non allocatur.* For these serve but for Aggravation of Damages, and are supplied by the Verdict. *Cro. Jac.* 561. *Pigot and Rogers.*

Fieri fac' for Debt was delivered to the Sheriffs of *N.* who executed it ; after which the Sheriffs were discharged of their Office, and new ones elected. The old Sheriffs redeliver to the Party *Nulla bona.* his Goods taken in Execution, and indorsed *Nulla bona.* on the Writ of *Fieri fac'*, and deliver it to ^{Action} the new Sheriff so indorsed. And an Action on ^{against} the Case was brought against the old Sheriffs for ^{the old} this false Return, and Judgment *pro Quer'*. And these Exceptions were taken.

The Office and Duty of Sheriffs, &c.

1. The Plaintiff in his Declaration does not say, that the old Sheriffs did return *Nulla bona*, but only that they did indorse *Nulla bona*, which is no Return.

2. He saith not, they delivered this Writ thus indorsed to be returned, *i. e.* by Indenture.

Tho' it appear not that any Return of the contrary was made by the old Sheriffs.

3. It appears not whether any Return of the Writ were made by the old Sheriffs, or the new. *Per Glyn* Chief Justice: He conceived it to be well, and according to the Course in that Kind, for the old Sheriffs to make the Return, and to deliver the Writ over by Indenture to the new Sheriffs; and here was a Verdict. And a Return is not properly a Return till it be filed here; yet it is the Return of the Sheriff in the County where he is Sheriff; and yet it seems Judgment was reversed. *Quære. Stile p. 474. Toft and Day.*

Non est inventus.

Action on the Case on a false Return of *Non est inventus* by the Sheriff of *Galloway* in *Ireland*. It was averred, That the Sheriff at the Time of the Delivery of the *Capias* had the Person in Custody at *Galloway* in the City of *Dublin*, and the Action is brought in the County of the City. *Per Sanders*: On a *Capias* delivered to the Sheriff out of the County, he is not bound to hold him there. So upon a *Latitat*, which is no Warrant to the Sheriff to take him, but only in his Bailiwick. *Per Cur'*, This may be by *Habeas Corpus*, or fresh Suit, and being after Verdict, that finds the false Return (for the Return was *Non est inventus in Balliva*) and the Jury find that he was in *Balliva* at the Return of the Writ, the Court will presume him legally in Custody. 3 *Keb.* 557, 561, 600. *Bradshaw* and *Andrews*.

For not arresting the Defendant *ubi potuisset*.

Plaintiff declares, he had prosecuted a *Capias* against *Chapman*, who was indebted to the Plaintiff in an Hundred Pounds, and delivered it to the Sheriff at *Newport P.* and that the Sheriff *postea*
& ad-

& *adunc* & *ibidem* potuisset arrestar' the said Chapman; but that the Defendant *machinans* to delay the Plaintiff, &c. arrestare the said Chapman, &c. *adunc* & *ibidem* abstinuit & recusavit, and had falsely returned *Non est inventus*. Defendant *Ret. Non* pleads *Non culp'*, and Verdict *pro Quer'*. *Per Cur' est inventus*. After Verdict the Declaration is good enough; and though *potuisset arrestare*, without shewing how, or that the Defendant was in View of Chapman, and *potuisset* denotes a Possibility; and this is true if he were in the County, and the Sheriff is not bound to attend his Office in every particular Case; yet it shall be intended such Matter was given in Evidence; by which it appeared to the Jury, That the Sheriff *potuisset arrestare*, and the Declaration, *quod recusavit*, doth imply Opportunity: But it was agreed to be good Cause of Demurrer. Sir Thomas Jones, p. 40. *Fish* vers. *Aston* Sheriff of Bedford.

Error brought by the Sheriff, upon a Judgment *Scire fac'* against him upon a Writ of *Scire fac'*, for an ill Return of a *Fieri fac'*. 2 Sand. 341, &c. *for an ill Return of a Fieri fac'.*

The Plaintiffs shewed, That the Sheriff returned, That his Officers had by Warrant seized Goods to the Value of One hundred and sixty Pounds, and that they were rescued out of their Custody, so that he could not levy the Debt; and that the said S. had no other Goods whereupon to levy it, and then the Plaintiffs suggest, That the Hundred and sixty Pounds were not paid to them. Defendant demurred. *Et judic' pro Quer'*. And the Defendant brought Error, That such *Scire fac'*, did not lie, but rather Debt; and also that the Sheriff was not chargeable upon a *Scire fac'*, if he did not return, That he had the Money in his Hands. *Sed non allocatur*. For the Plaintiff upon such Return could not sue out a new Execution, unless

174 The Office and Duty of Sheriffs, &c.

unless for the Surplus, and there could be no *Venditioni exponas*; and therefore the Plaintiffs ought to have Debt or a *Scire facias*, or otherwise they are without Remedy, and that by the Seifure the Sheriff had Property, and might reseise the Goods, though out of his Office: And Judgment was affirmed.

Taking away Goods in the Sheriff's Custody.

If upon a *Fieri facias* the Sheriff taketh Goods in Execution, and before the Sale of them, a Stranger takes them away out of his Possession, and converts them to his own Use, the Sheriff may have an Action of Trover and Conversion, for he had a lawful Possession, and is answerable for them. *Hill. 21 Car. 2. int' Wilbraham and Snow. 2 Sand. 47. 1 Mod. 30. 1 Sid. 438. 2 Keb. 589. 1 Lev. 282.*

By the Report of the Case in *1 Vent. 52.* it appears the Goods were taken away by the Defendant in the Execution; and adjudged *pro Quer.*

That Possession without Property is enough to maintain Trespass, but not Trover. *Per 2 Bulst. 135.*

Actions against the Sheriff for Non-feasance.

For not returning of Writs.

If a *Capias* issues against *J. S.* and the Sheriff doth not make any Return upon the said Writ, he is a Trespasser *ab initio*, and false Imprisonment lies against him. *16 H. 7. 14. 3 H. 7. 36. 21 H. 6. 5. 5 Rep. Hoe's Case.*

Before the *Stat. West. 2. 19.* regularly for not returning a Writ, the Sheriff was amerced *Quousque*

usque, &c. but for a false Return, or imbeziling False Return the Writ, Action lay at Common Law. Co. 2 Inst. turn.

451. *Raft. Entries*, 501, 626. Precedents of Actions on this Statute. This Statute prevents the Return of a *Tarde*, i. e. *quod Breve adeo tarde venit, Tarde. quod preceptum Regis exequi non potuit.*

It's a Question in Sir William Clark's Case, if *Cap' Ut* Action on the Case lies against a Sheriff for not *lagat*, returning a *Cap. Utlagar'*. It seems it does; for the Party has Loss by not returning the Writ, tho' the Queen may amerce him for his Contempt. *Cro. Eliz. p. 873. Sir Will. Clark.*

Action on the Case lies against a Sheriff for not Summons returning a Summons. 1 Leon. 146. *Marsh* and *Astrey*.

If a *Capias* be returned out of an inferior *Cap' out of* Court to an Officer of the Court to take *J. S.* and inferior he took him accordingly, and does not return the Court, Process, he is a Trespasser *ab initio*, forasmuch as and no Return. he is the Officer that ought to return it, and he is a Sheriff within his Jurisdiction. 2 Roll. Abr. 563. *Kirk* and *Atkins*.

If a *Capias* in Process be awarded to the Sheriff, and he makes his Warrant to a Bailiff errant, who is a sworn and known Bailiff within the County to take him, and he does it accordingly, if the Sheriff Bailiff does not afterwards return this Writ, it shall make errant or him a Trespasser *ab initio*, because he is but the Sheriff's Servant; and for this he ought to be sub- not to be ject to the Wrong done to the Party, as his Ma- punished for the not ster is. 20 H. 7. 13. 21 H. 7. 22. M. 14 Car. Return of B. R. *How* and *Stockenhar*. But if the Bailiff the Sheriff errant, in that Case, return the Body and the Warrant to the Sheriff, altho' the Sheriff doth not return the Writ, yet he is excused. And if the Sheriff upon such Process make special Bailiffs, and they take the Party, and the Sheriff doth not return the Writ; altho' there is not any Default in the

the Bailiffs, yet they are *Trespassers ab initio*, because they are but Servants to the Sheriff, and by his Appointment; but this seems a sorry Reason: And I take it, *Girling* and *Allen's* Case is good Law. For tho' the Sheriff ought to return his Writ, otherwise his Justification in false Imprisonment is not good; yet it is not so with his Servant, for he has no Means to enforce the Sheriff to make Return thereof; and if what he does is legal, it shall not be made illegal to him by the Act or Default of another. *Cro. Car. Gilling* and *Allen.* 11 *Car. B. R.*

Where no Default is in the Bailiff of a Franchise, he is excused. Upon a *Capias* in Process, if the Sheriff makes his Warrant to a Bailiff of a *Franchise* to execute it, who does it accordingly, and makes Return of the Body and Warrant to the Sheriff, and the Sheriff after does return the Writ, yet this shall not make the Sheriff a *Trespasser ab initio*, because he had done his Duty, and no Default is in him, and he is the Officer of the Franchise, and not of the Sheriff. 8 *Ed. 4.* 17. *b.* 21 *H. 7.* 22.

Sheriff not to file the Return, depending Action. The Court was moved, that the Sheriff may not be admitted to file the Return of a Writ, because Action on the Case was depending against him for not returning it; because then the Action would abate, and it was granted by *Roll. Stile* 408.

Laying the Action, and Declaration for not returning.

Writ delivered in London, and Summons in the County. In a Writ of Entry *sur Disseisin*, the Land lying in the County of *H.* if the Plaintiff deliver the Writ of Summons to the Sheriff of *H.* in *London*, and after the Sheriff summoneth the Defendant upon the Land, and after doth not return the Writ; for which Action on the Case is brought in *London*, where the Writ was delivered to him; and the Defendant pleads he did not summon him, &c. upon

upon which they are at Issue; this may be tried in London. 2 Roll. Abr. 807. *Rash* and *Astrey*.

Action on the Case against an Under-Sheriff, and declares, Whereas the Plaintiff had brought a Writ of Entry against H. C. and delivered it to the Under-Sheriff to be executed in *Forma Juris*, and gave him two Shillings for the executing of it, and that at such a Day he caused the said H. C. to be summoned, yet *falso*, &c. he did not return the Writ of Summons at the Day of the Return. Cro. Eliz. 175. *Marsh* and *Astrey*. And p. 397. Collet and *Marsh*.

For not returning the Summons.

It was moved in Arrest of Judgment, for that it is not averred he was Under-Sheriff, and continued in his Office at the Day of the Return; for otherwise the Action lies not against him. *Sed non allocatur*. 1 Leon. 146. *mesme Case*.

It is not averred, that the Officer continued in his Office.

It shall be intended that he continued in his Office, for he was Under-Sheriff when the Writ was delivered to him; and 'tis alledged; that he caused Summons to be made, and did not return it at the Day, by which it shall be intended that the Authority was in him. The Declaration was, That the said *Astrey* (Defendant) *intendens & machinans ipsum querentem in Actione sua pradiet' prosequend' impedire*, &c. did not return the Summons, but saith not *tunc existen'* Under-Sheriff, yet it is good; and if the Defendant were not Under-Sheriff, the same shall come in of the other Side. *tunc existen'*, &c.

Where a Man may have a Traverse, or aver against the Sheriff's Return, and where not.

It is commonly said in our Books, That no Averment shall be against the Sheriff's Return, which is of Record; and therefore in a *Redisseisin* it cannot be assigned for Error that the Sheriff *non accessit ad tenementa*, as he hath returned, for that is a

ing Averment, &c. against Returns,

gainst his Return, which is recorded. *Gaudy* in *Collet* and *Marsh's* Case. *Leon.* 183 *Holland's* Case.

Held . *Gaudy* in *Collet* and *Marsh's* Case. 1 *Leon.* 397. there may held, against any Thing done or returned by a Sheriff, as an Officer, there may be an Averment; as an Averment against a Bishop's Certificate; but

Econtra.

the other Justices *contra*: For the Justices ought to credit the Officers. Error, because the Defendant was not summoned in a *Pracipe quod reddat*, at the Church-Door, according to the *Stat.* 31 *Eliz.* c. 3. and by Reason of the Default a *Grand Cape* was awarded, and the Sheriff returned him summoned at the Church-Door.

Action *sur*
Deceit,
but not on
an Aver-
ment.

Per Cur', he shall not have this Averment, but his Action of *Deceit* against the Sheriff. *Cro. Eliz.* 397. *Collet* and *Marsh's* Case. So *Cro. Eliz.* 9, 10. *Clay's* Case. If in Partition the Sheriff return, He was there in proper Person, and this Return be received, and the Writ filed, then the Court cannot examine it; for the Return is good, and the Party can have no Averment against the Return, nor Error. The Jury appeared on a Trial, and the Defendant would have challenged the Array *ore tenus*, because it was returned by one S — Sheriff two Days after he had received a Writ of *Discharge*. *Per Cur'*, He cannot challenge it for that Cause; because it would be a direct Averment against the Record, for it was returned by him as Sheriff, and the Return accepted. *Cro. El.* 369. *Hore* and *Broom*. See after.

Traverse
allowed.

In the *Lady Russel* and *Wood's* Case. *Cro. El.* 780. the *King's Bench* would suffer a Traverse to a Sheriff's Return, because it is false. As 4 *El. Dyer* 412. and in the *Common Bench* it usual, and Precedents ordered to be searched.

Sed

Sed distinguendum est. And I shall shew in what Cases one may aver against the Return of the Sheriff.

A Man may aver against the Return of the Sheriff, if the Return be a Matter Collateral.

As if the Sheriff upon a *Capias* return a *Rescous*, there may be an Averment against it. *Owen* 132. *Rescous.*

So *Winch. p.* 100. in another Action Averment may be against the Return of the Sheriff, tho' not ther in the same Action; as *5 Ed. 4* for false Return.

Winch p. 100. *Stiles* versus Sir *Francis Glover*.

If the Return of the Sheriff concern my Inheritance, I shall have Averment against it. *2 Roll's Rep. 54.* *Return concerns a Man's Inheri-*

In a *Præcipe quod reddat*, at the Summons returned, he may say that his Name is *T. B.* and that he was summoned by the Name of *J. B.* because otherwise he shall lose his Land by Default. *19. H. 6. 10. b.*

If the Sheriff return a Man outlawed of Felony, he may aver against this Return, That he came in lawry for at the 5th County, and tendred Sureties, and so was outlawed; for this is in Case of Life and Member. *1 Ed. 3. 24. b.*

On *Scire fac'* against the Tertenants, the Defendant, after the Return of the Sheriff, pleads, That he is not Tenant. The Plaintiff demurs; because, as *Cro. El. 872. Blood's Case*, he is estopped by the Sheriff's Return. And in *Rastal's Entries*, Tertenancy is traversed: And *4 El. Dyer 212.* the Return of a *Capias* is traversed as to Rescue. And *Waste.* *Cro. El. 859.* it is agreed, That Waste is traversable on the Return of the Sheriff. But *per Cur'*, a general *Non-tenure* by Lessee for Years is pleadable; for else his Possession would be disturbed by Ejectment. *Cro. El. 872. Co. Ent. 620, 622, 3, 4. Cro. El. 859. 3 Keb. 170. Witrony* versus *Blany*.

Diversity between a general *Non-tenure*, and a special *Non-tenure*, pleaded. So per *Windham*: In some Cases one may plead and aver against the Return of the Sheriff, as to a *Scire facias*, that there were other Tertenants not named, for he is not omniscient. And tho' the Sheriff return that such are Tertenants, yet that shall not conclude the Defendant, but that he may say another is Tertenant of Parcel, who is not warned. But *Roll* is exprefs, That *Non-tenure* cannot be pleaded in Error against the Return of the Sheriff. 1 *Keb.* 55. *Guin's Case*. *Cro. Jac.* 50. *Mitchel's Case*. 2 *Roll's Rep.* 202.

Waste. View.

In Waste, if the Officer return, That the Jury had the View; yet if the contrary appear by Examination at the Trial, the Return shall not conclude any of the Parties. 2 *Sand.* 255. *Green and Cole*.

Averment that he was not Sheriff.

Tho' a Man may not aver contrary to the Sheriff's Return; yet he may say, He which had indorsed his Name on the back-side of the Writ was not Sheriff; because by the common Law, until the *Stat. of Ed. 2. c.* - no Sheriff or Officer used to put their Names to the Returns; and this Averment, That he that made the Return is no true Officer, is not taken away by the Statute. *Yelv. p.* 34. *Arundell's Case*.

Averment against false Returns of Bailiffs of Franchises.

If Bailiffs of Franchises that have Returns of Writs, make a false Return, the Party shall have Averment against it, as well of too little Issues as of other Things, as well as he shall have against the Sheriff; but all the Punishment shall be upon the Bailiffs. *Dr. and Stud. 2d Book.* 42. *c.*

Writ of Privilege. The Sheriff returns a Rescous on mean Process to a Writ of *Privilege*, and Attachment awarded *nisi causa*. The Preignotaries affirmed, That the Parties might traverse the Return; but *tota Curia* of Opinion to the contrary. Sir *Thomas Jones p.* 39. *Fawcet and Cotton*. For Returns of *Venires*, &c. *vide postea* 186, &c.

See

See further of Sheriffs Returns in the last Edition of the new *Returna Brevium*, now printing for *John Walthoe*, in the Temple Cloysters.

C H A P. X.

Of Venire facias, Habeas Corpora Juratorum, and Distringas. *What Returns shall be good on a Venire, &c. or not. Amendments of Venire's, &c. Of Tales.*

Venire fac', Habeas Corpora & Distringas.

Of the Statutes of Jeofails.

TH E Principal Statutes of *Jeofails* are, 8 H. 6. *Jeofails.*
 c. 12, &c. 15. 32 H. 8. c. 30. 18 El. c. 14. *Vid. Gen.*
 21 Jac. c. 13. 16 & 17 Car. 2. c. 8. *Abridg-*
 8 H. 6. c. 12. extends to any Record, Specialty, *the Law.*
 Copy, &c. 2. Parol. 3. Plea. 4. Warrant of Tit. A-
 Attorney. 5. Writ Original and Judicial. 6. Pa-
 nel. 7. Return. But by it Misprision of Clerks *mendment.*
 are only amendable: But it extends not to an in-
 sufficient Trial, where the *Venue* is mistaken. It
 extends not to a Return of a Sheriff, where it
 should be by a Coroner: Nor to a Trial by one not
 returned in the *Venire fac'*: Nor to a Return of a
Venire fac' without the Name of the Sheriff. Now *Misprisi-*
 these Misprisions are not remedied by 8 H. 6. c. 2. *ons not*
 32 H. 8. nor 18 El. c. 4. (*viz.*) Where the Return *remedied*
 is by the Sheriff; where it ought to be by the Cor-
 ner; when the Sheriff does not put his Name to the
 Return of the Jury; when no Return is on the *Ve-*
nire fac'; nor when one gives a Verdict, who is
 not returned; nor to insufficient Trials, where the
Venue is mistaken. 8 Rep. *Blackmore's Case.*

The Office and Duty of Sheriffs, &c.

21 Jac. 1. cap. 13. By the St. 21 Jac. 1. c. 13. After Verdict, Judgment shall not be arrested, for that the Venire fac, Hab' Corpora, or Distringas, was awarded to a wrong Officer, upon any insufficient Suggestion, or that the Venue was in some Part misawarded, or issued out of more or fewer Places than it ought to be, so as some one Place be right named. Or for misnaming any of the Jurors either in the Sirname, or any Addition in any of the Writs or Returns thereof, so as *constat de persona*. Or for a Want of Return of any of the said Writs, so as a Panel be returned and annexed thereunto; or for that the Officer's Name is not set to the Return.

To what Stat. Jeofails do not extend.

No Acts of Jeofails extend to Appeals or Pleas of the Crown; nor to Actions or Informations on Penal Laws, except in 16 & 17 Car. 2. other than concerning Customs, Subsidies of Tonnage and Poundage, to which it extends not. But the Stat. 21 Jac. helps not, if the Christian Name of a Juror be mistaken, and the Law notwithstanding. *Codwell's Case*. 5 Rep. Roll, 176. and *Cro. Jac.* 458. *Goddard's Case* remains as it was.

But it is amendable per Stat. 18 Eliz. as a Discontinuance of Process, as *Teppet* on the *Venire*, and *Tippet* on the *Distringas* was amended. So *Samuel* in the *Venire*, and *Daniel* in the *Nomina Jurator*.

If no Verdict.

If there be no Venue, it's aided by 16 & 17 Car. 2. after a Verdict, if the Cause be tried in the proper County where the Action is laid. 2 Sand. 227. *Perry's Case* in *Skinner's Case*. Vide infra.

To what Judgments the Statutes of Jeofails shall be extended.

Note, By Stat. 4 & 5 Anna, for Amendment of the Law, That all the Statutes of Jeofails shall be extended to Judgments by Confession, *nil dicit*, or *non sum informatus* in any Court of Record, and no such Judgment shall be reversed, nor any Writ of Enquiry of Damages executed thereon, be stay'd or reversed, for or by Reason of any Imperfection, Omission,

Omission, Defect, Matter or Thing whatsoever, which would have been aided and cured by any of the said Statutes of *Jeofails*, in Case a Verdict of 12 Men had been given in the said Action or Suit, so as there be an Original Writ or Bill, and Warrants of Attorney duly filed according to the Law as is now used, &c.

And whereas great Delays do frequently happen To pre-
in Trials, by Reason of the Challenges to the Ar-
rays of Panels of Jurors, and to the Polls, for De-
fault of Hundredors; for Prevention whereof, 'tis Chal-
enacted, That every *Venire facias* for the Trial of the Ar-
any Issue, in any Action or Suit in any of her Ma-
jesty's Court of Record at *Westminster*, shall be Panels
awarded of the Body of the proper County where upon *Ve-
nure's*.
such Issue is triable.

But this Act not to extend to Appeals, Indict-
ments, Presentments; or to any Writ, Bill, Action Not to
or Information upon any Penal Statute. extend to
Appeals,
&c.

Yet this Act, and all the Statutes of *Jeofails*, to
extend to all Suits in any of the Courts of Record To ex-
at *Westminster*, for Recovery of any Debt immedi- tend to
ately owing, or any Revenue belonging to her Ma- Counties
jesty, her Heirs or Successors; and shall also extend Palatine,
to all Courts of Record in the Counties Palatine and all
of *Lancaster*, *Chester*, *Durham* and the Principality Courts of
of *Wales*, and to all other Courts of Record with- Record.
in this Kingdom.

If the Plaintiff deliver the *Venire* to the Sheriff *Venire*
Tarde, so late that he cannot serve it, the Defen- with a
dant shall have a Writ with a Proviso; but at Proviso.
the same Time the Plaintiff may have another
Writ, and the Sheriff may not return which of
them he pleaseth, the Proviso ought to be *quando
duo brevia sunt in eodem gradu & qualitate.* 8
H. 6. 6.

Default
in Plain-
tiff after
Issue.

If the Default be in the Plaintiff after Issue in the Prosecuting of the *Venire facias*, then the Defendant may have a *Venire facias* with a Proviso; but not an *Habeas Corpus* with a Proviso, until the Plaintiff have made a Default in the same Writ: For he ought only to have the same Process with a Proviso, in which there was a Default of the Plaintiff first; and therefore though the Defendant had a *Venire facias* with a Proviso, upon a Default of the Plaintiff; yet he cannot have a *Nisi prius* by Proviso, without another Default of the Plaintiff.

Rules to
try Causes
by Pro-
viso.

And note, it is observed, That in Actions laid in London or Middlesex, the Defendant ought not to give the Plaintiff a Rule to enter his Issues, or to try the Cause by Proviso, the same Term Issue is joined, unless the Plaintiff hath first given the Defendant Notice of a Trial that Term, and hath made Default: And that if the Action lies in the Country, the Defendant shall give the Plaintiff a Rule to enter his Issue as of the same Term Issue is joined. 1 Part Instruct. Cler. 74.

7 & 8 W. 3.

And per 7 & 8 W. 3. for the Ease of Jurors, and better Regulating of Jurors, it is enacted, That if the Plaintiff shall not proceed to Trial of the Issues at the first Assizes, after the *Teste* of the Writ of *Habeas Corpora* or *Distringas*, with a *Nisi prius*; That then, and in all such Cases (other than where Views by Jurors shall be directed) the Plaintiff or Demandant, whenever he shall think fit to try the said Issue at any other Assizes, shall sue forth and prosecute a new Writ of *Venire facias*, directed to the Sheriff in this Form:

The Form
thereof.

*Quod de novo Venire facias coram, &c. duodecim
liberos & legales homines de Vicin' de (A.) quorum
quilibet habeat decem librat' terr' tenemen' vel reddit'
per*

per Annum ad minus per quos, &c. & qui nec, &c.
after the ancient Manner, That is to say, the Writ
is to be in the same Form as the first, only adding
the Words (*De novo.*)

Which Writ being duly returned and filed, a *Hab. Corp.*
Writ of *Habeas Corpora* or *Distringas*, with a *Nisi & Distringas*
prius, shall issue thereupon for the ancient Fees. *gas, &c.*
As in the Case of a *Pluries, Habeas Corpora* or *Distringas*,
with a *Nisi prius*, upon which the Plaintiff or Demandant shall
and may proceed to Trial, as if no former Writ of *Venire facias* had
been prosecuted or filed in that Cause, and so *toties quoties*
as the Case shall require.

And if any Defendant or Tenant shall be minded Trial by
to bring the Issue to Trial by *Proviso*, (when *Proviso*.
by Course he may) he may, of the issuable Term
next preceding such intended Trial to be had at
the next Assizes, sue out a new *Venire facias* to the
Sheriff in Form aforesaid by *Proviso*, and prosecute
the same by Writ of *Habeas Corpora* or *Distringas*, *Et Ve. fa. de novo, &c.*
with a *Nisi prius*, as tho' there had not been
any former *Venire facias* sued out or returned in
that Cause, and so *toties quoties* as the Matter shall
require. (See the Act.)

This also provides, That Jurors to serve up-
on the *Tales* shall be Freeholders or Copyhold-
ers of the County, and returned upon some *Tales-Men*
other Panel to serve at the said Assizes, and at-
tending in Court, and may be challenged by Plain-
tiff or Defendant, Demandant or Tenant, as if Chal-
they had been impanelled upon a *Venire faci-* lence.
as to try the Issue.

Note,

Note, That as to View by Jurors.

View.

By the late Act for Amendment of the Law, it is enacted, That when a View of Messuages, Lands or Places, in Question shall be thought necessary by the Court, for the Jurors better Understanding the Evidences that will be given upon the Trials of such Issues, in every such Case, the respective Courts in which such Actions shall be depending, may order Special Writs of *Distringas* or

Special
Distringas
or *Hab*
Corp *Jur*.

Habeas Corpora to issue. By which the Sheriff, or such other Officer to whom the said Writs shall be directed, shall be commanded to have six out of the first Twelve of the Jurors named in such Writs, or some greater Number of them at the Place in Question, some convenient Time before the Trial, who

View.

then and there shall have the Matters in Question shewn to them by two Persons in the said Writs named to be appointed by the Court; and the said Sheriff or other Officer, who is to execute the said Writs, shall, by a Special Return upon the

Special
Return.

same, certify that the View hath been had according to the Command of the said Writ. See the Statute.

When
the *Venire*
ought to
be delivered
to the Sheriff.

Note, The *Venire* ought to be delivered to the Sheriff four Days before the Return of it, if the Jury dwells forty Miles off, and eight Days, if they dwell farther from the Place where the Trial is to be. *Pract. Reg.* 87, 333.

The Name of the Sheriff to the *Distringas* and *Tales*, are of Necessity, and to the Return of the *Habeas Corpora* by the Statute of York, 12 Ed. 2. c. 5. and these are not holpen by any of the Statutes of *Jeofails*. Cro. El. 310. *Steyner* and *James*. Cro. Jac. 188. *Holdswrith's Case*. Cro. El. 509. *Blodwel's Case*, 482, *Weare's Case*.

What

What Return shall be good in a Venire, or not; and what shall be Error, and what amendable.

Insufficient Returns are aided by the Statute of Omission *Jeofails*: As upon the Return of the *Venire fac'* of there wanted these Words, *Quilibet Jurator' per Pledges. Plegios*. This is not, as if there was no Return at all. And *per Cur'*, it's an insufficient Return which is aided, and it was awarded to be amended; for the Omission of Pledges is but Matter of Form, and not like to Dr. *Hussey's Case*, where there was a Want of an Original. And so in 2 *Roll. Rep.* 87. the Sheriff returns a *Venire fac'* (*viz.*) *Executio istius brevis, &c.* and the Panel of the Jurors was filed to it; but under the Names of the Jurors he omitted to file the Pledges. *Cro. Jac. Moor and Blackwell. 2 Roll. Rep. 87.*

In the Writ of *Venire fac'* awarded to the She-*Viccomiti* riff of *Somerset*, the Word (*Viccomiti*) was omitted; yet he returned the Panel, and his Name was endorsed. *Per Cur'*, it is Error; but because upon the Roll it was *Vic' Somerset*, it was amended. *Cro. Car. 595. Sloper and Child.*

Venire fac' was *album breve* (*i. e.*) no Name of *Album* the Sheriff was endorsed. It was denied to be a-breve. mended. 1 *Brownl. 43. Bullen and Farvis.*

The Return of a *Venire* by one Sheriff of *London*, is ill, and not helped by the *Stat. 21 Jac.* But a *Certiorari Coronatoribus*, where there is but one, is well enough. *Hob. 70. 1 Keb. The King against Percival.*

A *Venire facias* was awarded in the Time of *Variance*. Queen *Elizabeth*, and a *Distringas* with *Nisi prius* in the Time of King *James*, reciting *quod distringat Juratores nuper summonit' in Curia nostra*, whereas in Truth there had not been any Summons in *Curia* of the King, but of the Queen only,

ly, and Trial and Judgment thereupon; and it was reversed for this Error: For this *Distringas* with *Nisi prius*. *Nisi prius* is a special Authority to the Justices, who being Justices by the special Commission, and not having Authority to take any Jury but such as was summoned in *Curia Regis*, there being none such, the Trial by the Jury was erroneous. *Goodwin's Case*, cited in *Comyn's Case*. *Cro. Jac.* 161. But in the principal Case, which was Error of a Judgment in *Durham*, such Case was amended; because the Justices of *Durham* are original Judges of the whole Record, and had the Record before them at the Time of the Trial, and the Writ being variant, might be amended there. *Cro. Jac.* 161. *Goodwin's Case*.

Amend-
ment in
Durham,
and why.

W. T. for The *Venire* was between *Heath* and *J. T.* and
I. T. the Sheriff returned it to be between *Heath* and
Mis-trial. *W. T.* This was a Mis-trial, and Judgment shall
not be for the Plaintiff. *Winch.* p. 73, *Trist's*
Case.

Teste sun- *Venire fac'* bears *Teste* on a *Sunday*; it was a-
day. mended after Trial. *Short* and *Arundel's Case*.
See *Tutchin's Case*. 6 *Mod.* 268. to 287.

Amend- A *Venire fac'* bore *Teste* out of Term, and made
ment by to accord with the Roll. *Gonnel's Case*; and a *Di-*
the Roll. *stringas* was amended a long Time after the Trial;
yet, the Roll being good, it was amended. *Cro.*
Jac. 161. *Comyn's Case*.

Præcipimus *Venire* awarded, *Vicecomitibus Lond' præcipimus*
sibi. *sibi*, was amended after Verdict. So if after the
Habeas ibi hoc breve, if the *nomina Jurator'* be
left out. *Cro. El.* 543. *Roll.* 201.

Præceptum In the Award of a *Venire fac'* super quo præcep-
est. tum fuit *Vicecomiti Com', &c.* it is Error; it
ought to have been *Præceptum est.* 2 *Sand.*
393.

The *Nisi prius* Roll is, That Challenge being Amend-
made to the Sheriff after Issue and confessed, a ment.
Venire fac' was awarded to the Coroners; but the *ser Chal-*
Roll of *Nisi prius* was, that the *Venire fac'* was lence.
awarded to the Sheriff. *Per Cur'*, This Roll of
Nisi prius being a Misprision and which ought to
be warranted by the Record, ought to be amended
Cro. Jac. 353. Sir Ed. Musgrave. Winch. Rep.
p. 73.

If the Sheriff return, That there are no Free-Where a
holders of the *Visne*, or if the *Visne* be where the *Venire fac'*
King's Writ runs not; as in the *Cinque Ports, &c.* shall be
or in a Place where the Men are privileged from of the
serving on Juries out of that Place, as the Island Issue next
of *Ely, &c.* the Plaintiff may pray a *Venire fac'* adjoining
of the *Visne* next adjoining; and if the *Visne* be
in *Wales*, (where the King's Writ runs not) the
Venire fac' shall be directed to the Sheriff of the
next *English* County, to cause the Jury to come
de propinquiore Visne of his County to the *Visne*
in *Wales* adjoining; for the Court shall not be
ousted of the Plea. *Fitzh. Abr. Tit. Visne 8. Ju-*
risdic't. 24.

If the Words (*quorum quilibet habeat*) be left Words
out, or *duodecim*, or *qui nulla affinitate attingunt*; left out.
these are amendable, as Mistakes of the Clerks. *Roll.*
204, 205.

Venire fac' was in this Manner; *Jacob', &c. Vice-* County
comiti salutem, and saith not of what County; omitted.
it was amended. *Cro. Jac. 78. Low and La-*
cock.

Venire fac' was returnable *coram Majore & Bal-* Error.
livis de Exeter, without saying *in Curia vel hic*.
It is Error, because it may be returned in a Tavern.
Siderfin p. 77. Davies and Pitts.

Venire fac' quash'd. If a *Venire fac'* be quashed for Consanguinity to the Sheriff, a *Venire fac' de novo* shall be granted to the Coroners. 2 Roll. Abr. 720.

Venire fac' de novo. The Awarding of a new *Venire fac'* to the Sheriff, where the *Venire fac'* was quashed for Favour in the Under-Sheriff, is not Error. 1 Roll. Rep. 272.

Ven' fac' to a wrong Officer. A *Venire fac'* is to the Coroners, without any Suggestion at all of any Challenge to the Sheriff. This is not aided by 21 Jac. c. 13. nor by the 16 & 17 Car. 2. c. 8. and the Court cannot amend this Direction of Process to a wrong Officer; and the Court cannot examine the Truth without a Suggestion. And Judgment was arrested. 3 Keb. 624. Hancock and Weyman.

Judgment arrested. Error. *Venuë* awarded to the Coroners, and *Tales* to the Sheriff is erroneous. Cro. El. 574. Morgan and Wye.

Coroners. If a *Venire fac'* be directed to the Coroners, all the Coroners ought to join in the Return; and so both of the Sheriffs of London ought to join, or else the Return is not good. Hobart 97. Dalt. 536.

Error. The Sheriff need not return the Names of all the 24 on the *Distringas*, *Hab' corpora*, or *Venire fac'*, nor affix them to the said Writs. 1 Keb. 418. Coldham and Loe.

Distringas amended *per le Vic'*. And it was agreed *per Cur'*, 2 Roll. Rep. 111. because the *Venire fac'* was good and well returned, the *Distringas* shall be awarded by the Sheriff. 2 Roll. Rep. 111.

Distringas. If a *Distringas sicut alias* issue against the Jury, and no other *Distringas* was awarded against them before, by which the Supposal of the Writ is false; yet this is not Error, for the *Venire fac'* serves instead of a *Distringas*. 2 Roll. Rep. 133.

Hab. Cor. The Panel of the *Hab. corpora* was amended upon the Sheriff's Oath. And where the *Distringas* was

was blank, yet the *Venire fac'* was well returned.

Cro. Fac. 483. *Church and Wright.*

A contrary *Distringas* is by the Sheriff put to Contrary the right *Panel* and tried: The Trial was held *Distringas*. good, so tho' no *Distringas* had been; for as this is, there is no Writ between the Parties. 3 *Bulstr.*

180. *Fowkes and Child.*

Upon an Information against *Tutchin*, the *Distringas* was tested the Day after the Return of the *Venire facias*, and held not amendable. See 1 *Salk.*

51. 6 *Mod.* 164. 268. to 287. and *State-Trials*

pa. 659, to 706. touching *Amendments of Process.*

1 *Lev.* 2. 143. 1 *Danv.* 335. &c. *ibid.*

Tales not removed by the Sheriff or his Deputy, *Tales*, or any sworn Officer, but by a Clerk of the Court; by general Appointment of the Sheriff it's well enough, and the Sheriff is answerable for it.

1 *Keb.* 357. *L'Estrange and Temple.*

Array returned by the Sheriff, after his Dis- *Array af-*
charge, is not good. *Cro. El.* 369. *Hore and ter, &c.*
Broom.

Precedents.

Distringas Furatores on the *Hustings. Vid. the Returns*
Form, 2 *Sand.* 240. of *Venire*
fac'.

Return' de Venire fac' Jur'
Executio istius brevis patet in quadam pannella *Executi-*
huic brevi annex' on.

A. B. *Armig. Vic'.*

Nomina Jurator' inter A. B. Quer' & C. D. Nomina.
Def. in placito Transgress.

Then

Then write down the Names of the 24 Jurors
thus:

A. W. de E. gen'

F. C. de W. Yeoman

} & sic ad 24.

Pleg.

*Quilibet Furator' prædictor' per se } J. D.
separatim Manucapi', } R. R.
Or, Attachatus est per pleg'.*

A. B. *Armig' Vic.*

Hab. Cor.

The like in the *Habeas Corpora*.

Only in the Return of this Writ the Sheriff must return Issues on every Person.

Exit.

Exitus eorum cujuslibet — x s. or more. *Dalh.*
286, 287. c. 78. *New Natura Brevium* 423,
424.

C H A P. XI.

Of Habeas Corpus, and Returns upon it. Of Habeas Corpus. The several Sorts, and the Consequences thereof. Of the Returns of Habeas Corpus by the Sheriff, &c. and in Respect of the Courts commanding. Rules on Habeas Corpus, who to pay the Charges. The Forms of the Returns.

AN Habeas Corpus is either *ad subjiciend'*, Habeas which is granted on the Criminal Side, or an *ad respondend'*, *recipiend'* or *faciend'* ^{*ad respondend'*, *recipiend'*, &c.} Habeas Corpus granted on the Plea Side; for so the Court of the King's Bench is divided in the Practice of it, (that is to say) into criminal Causes between the King and the Party, and civil Causes between Subject and Subject.

Now an *Habeas Corpus ad respondend'* is, when *Hab. Cor.* any one is imprisoned at the Suit of another upon *ad respondend'* a legal Process in the Fleet, or any other Prison except the King's Bench Prison, and a third Person would sue that Prisoner in this Court (*B. R.*) and cannot, because he is not in Custody of the Marshal of this Court, there he may have an *Habeas Corpus* to remove the Prisoner out of the Prison where he is, into this Court, to answer to his Action here. This is called a *Habeas Corpus cum Causa*. ^{Is an *Hab. Corp. cum Causa*.} *Cum Causa*, doth remove the Prisoner for whom it is granted, and all the Causes which are then depending against him; for upon *Habeas Corpus* to an inferior Court, to remove *Corpus cum Causa*, they ought to return all the Causes that are depending there concerning the Party that hath the *Habeas Corpus*,
O if

if any of the Causes depending be above 5 l.) *Stile's Rep.* 150.

Bail.

When an *Habeas Corpus* is awarded, and Bail taken, though they be not filed, yet presently the Prisoner is discharged, and his Sureties also in the inferior Court. *Cro. Jac.* 203. *Franley and Bassett.*

One was in Execution in the *Fleet*, for a Debt recovered against him in *C. B.* he being before condemned in the *King's Bench* for another Debt, was by *Habeas Corpus cum Causa* removed into the *King's Bench*; *per Cur'* in this Case he may acknowledge Satisfaction for both Debts in *B. R.* he being in the Custody of the Marshal for both Debts. If the Marshal suffer him to escape, he shall be charged for both the Debts. *Dyer* 152, 307.

As for Returns of Habeas Corpus.

What shall be a good Return on *Habeas Corpus*, or *Corpus cum Causa*.

Ad recipi-
end.

Amend-
ment.

An *Habeas Corpus* to remove one committed for Debt from one Prison to another, may be granted returnable *immediate* or *indilate*, for this is only an *Habeas Corpus ad recipiend'* in the Nature of it.

An *Habeas Corpus* is not a Record till it be returned and filed, and then it cannot be amended, but it may be amended before it is filed.

Conclusi-
on of the
Return.

Whatsoever Person, or by what Means soever he was committed, the Conclusion of the Return ought to be *Corpus tamen ejus paratum habeo*; yet it cannot always be so. *1 Leon. p. 70.*

Return
by the
Chancel-
lor of
Durham.

An *Habeas Corpus ad subjiciend'* is always intended to him that has the Body, tho' *ad faciend'* may be circular, as an *Habeas Corpus* was directed to the Chancellor of *Durham*, that he make a Precept to the Sheriff, to have the Body *coram nobis apud Westm.* The Return is, That the Chancellor issued a

Pre-

Precept to the Sheriff to return his Body before him; and that the Sheriff returned *paratum habet*, and it's not said the Chancellor had him here, which is ill *per Cur'*, for it should be *cujus Corpus paratum habeo* in this Court. 3 Keb. 229. The King against Pell and Offley.

Habeas Corpus was directed to the Steward and Marshal of the Marshalsea for one H. the Marshal returns the said H. was committed to his Custody, *per Mandatum Francisci Walsingham Mil' Principalis Secretar' & unius de Privat' Concilio Domini Regis*. This is insufficient, because the Cause of Commitment is not set down in the Return: Then it was amended and returned in this Manner --- *ex sententia & mandato totius Concilii privati Domini Regis ita qd' ejus corpus habere non possumus*. This *per Cur'* is insufficient also; he ought to have concluded *Corpus ejus tamen parat' habeo*. Cause of Commitment shewed.

Note, Where the Party is committed by the whole Council, no Cause of the Commitment need to be shewed. 1 Leon. p. 70. *Sed Quære*. For by the *Habeas Corpus* Act the Law seems otherwise.

On *Latitat* the Sheriff returned, That he had arrested the Defendant, and that such a Day, and before the Return of the *Latitat*, a *Habeas Corpus* was to bring the Body into Chancery, and there the Prisoner was discharged; the Return is good, for the Sheriff is bound to obey the King's Writs, and he cannot compel the Parties to put in Sureties here in *B. R.* But it was ill done of the Master of the Roll's to discharge him. *Per Curiam*, we have oftentimes Persons here upon *Habeas Corpus*, who are also arrested by *Process* out of the *Exchequer*, or of the *Common Pleas*; but we will not discharge them before they have found Sureties for their Appearance, and we cannot punish the Sheriff; for the *Habeas Corpus* was first returnable before the

Amend-
ment.

the *Latitat*. But because the Return was *a custodia nostra exoneratus fuit*, which might be intended as to the Cause in *Chancery* only, and not for the Cause here, for he hath not alledged, that he was committed to any other in Custody; the Sheriff was to amend his Return. 1 *Leon.* 145. *Cary* and *Dennis*.

A Return of *Habeas Corpus* by the Warden of the *Fleet*, was *propter contemptum extra Cur' Cancellariae*. It is not good. 1 *Roll Rep.* 92.

General Directions for Writs of *Habeas Corpus*, Error or Privilege, *vid. Compleat Solicitor* 106. and other *Manuals*.

That the
Justices
commit-
ted him
for a Fine.

On *Habeas Corpus* the Sheriff returns, that the Justices of Peace committed the Plaintiff for a Fine on Contempt, for which the Court awarded him to remain in Prison till Payment. *Siderfin* p. 144. *The King* versus *Mayo*.

Prote-
ction.

The Return on *Habeas Corpus* was a Protection. 1 *Leon.* p. 70. *Searcher's Case*.

Return to
be writ on
Parch-
ment.

Note, The Return of an *Habeas Corpus* ought to be written on Parchment, and not on Paper; for the Return is to be filed, and made a Record of Court, and all Records are to be written on Parchment: And therefore, after the Return is read and filed in Court, it cannot be amended: But in *Hob.* p. 113. an *Habeas Corpus* was returned without the Sirname of the Sheriff, and after Verdict amended.

Amend-
ment.

Good to
Common
Intent.

It is agreed, The Return of an *Habeas Corpus* need not be so punctual as a Plea, because not made by Persons of such Learning as Pleas are; but if they be good to common Intent and Substance, it's enough.

Rule to
bring in
the Body.

Upon *Habeas Corpus* granted by the King's Bench to the Warden of the Fleet, to have here in

in Court the Body of *D. W.* the same returnable at a Day certain ; at which Day the *Warden of the Fleet* did refuse to make his Return, and to bring in the Body. And the Court entred a Rule to bring in the Body of *B. W.* the next Day *sub pœna 20 l.* and so are all Precedents of Felony and Treason.

Note, If it appear that the Commitment is good, Dis- and there is good Cause ; the Court remands the charge. Prisoner ; if it is not good, they discharge him ; if it be doubtful, they bail him.

The Sheriff may suggest, that the Party will not Who to pay his Charges of Return of *Habeas Corpus*, *ad* pay the *faciend' & recipiend'*, which is at the Suit of the Charges Party. But *contra* in *Habeas Corpus*, *ad faciend'* of the *& subjiciend'*, which is at the Suit of the King, Return. he must return at his Peril. 1 *Keb.* 272, 280. *The King versus Armiger.*

And on *Habeas Corpus* to remove any Prisoner, Court the Sheriff must return the Writ, and the Court will allow will allow his Charges here. So in the Case of Charges. the Steward of----

Upon *Habeas Corpus*, the Officer ought to bring And com- the Prisoner to the Court, and the Court shall taxpel Pay- Charges and compel Payment, if the Officer and ment. Prisoner or Plaintiff cannot agree, or Payment be not made according to the Agreement. Sir *Tho. Jones* p. 178.

Error on a *Scire fac'*, on the Sheriff's Return being an Original Suit, lies not in the *Exchequer-Chamber*, but Error on *Scire fac' Quare Executionem non*, hath been constantly allowed to lie there. 2 *Keb.* 833. *Jones* and *Anderson*.

*The Form of the Return.**Languidus,*

Detent' in Prifona, attamen Corpus ejus, &c.
 The Causes of the Caption and Detention returned. *Vide Dalton cap. 63.* that he was taken in Execution by the late Sheriff, &c. that he was imprisoned by a Justice of Peace his Warrant, &c. See also *New Ret. Brev.* from 275 to 319.

Return of a Certiorari per Viscount.

Certiorari. The Sheriffs of *London* appeared in Court in their proper Person, upon a Rule of Court, to shew Cause why they did not grant out Execution upon a Judgment given in their Court, or else to make a sufficient Return of a *Certiorari* directed to them, because they had made three insufficient Returns. *Stile p. 444.*

Heir. A *Certiorari* was directed to the Sheriff to certify, whether the Conisor in a Recognizance had an Heir. *Jones p. 319.*

Note, A *Certiorari* lies to all inferior Jurisdictions, as, To the Courts of *Ely*, and all Counties Palatine, Justices in *Wales*, &c. Justices of Peace in their Sessions, or otherwise Commissioners of Sewers, &c. *1 Salk. 145, 148, 149.*

So it lies on a Judgment given by the Censors of the College of Physicians, because Error does not lie. *Ibid. 144.*

And the whole Body of Commissioners of Sewers were committed for disobeying a *Certiorari.* *Ibid. 145.*

C H A P. XII.

How many Sorts of Juries. Of Returns, and by whom returned; what manner of Persons shall not be returned on Juries, and how they shall be discharged. Where, when, and how Persons exempt shall have Action against the Sheriff for Impanelling them. Of returning trop petit Issues, Of levying the Issues. Of other erroneous Proceedings, and Misdemeanors of Sheriffs about Jurors. What Estate every Juror must have by the late Statute of 4 & 5 W. & M. Of Challenges, the several Sorts and Causes of Challenge, and what are good or not, and when to be taken.

*Of Enquiry.**Of Trials betwixt Party and Party.*

Jurors are of Two Sorts. Jurors of two Sorts.
 Juries to enquire, are Grand Juries at Assizes, or the Quarter-Sessions. So Juries returned before Justices of Peace, to enquire of Riots, Forcible Entries, and Juries returned before Commissioners of Sewers, or upon the Statute of Bankrupts, Coroners, &c. and Inquisitions taken before the Sheriff, and all these the Sheriff is to summon (except Bankrupts). *Qu.*

Now upon every Trial in Personal Actions, the Sheriff must return Two Hundredors at least. In Personal Actions.
Litt. 125, 158. See after.

As for the Number of Jurors returned, *vide* Number Dalton 86.

Return of Jurors.

Jury re-
turned by
the Secon-
dary.

If it be conceived an indifferent Jury will not be returned in the Country, the Court on Motion will order the Sheriff to attend the Secondary of the Office with the Book of his Freeholders, to have an indifferent one returned. *Pract. Reg.* 337. So it was done in *Pooles* and *Markham's* Case, *Stile* 477. because the Plaintiff in a former Trial between the Parties had feasted Four of the Jury, and had feasted some of the Jury that were returned upon that Trial; and the like was done in *Coxe's* Case, 15 & 16 *Car. 2. B. R.* because *Cox*, who was intituled to the Reversion, had forbid Rent to be paid by the Tenants, and took on him the Defence of the *Ejectment* brought against the Tenants, was of Kindred to the Sheriff and Under-Sheriff, and Trustee for them: But in another Case, 17 *Car. 2. B. R.* The Court on Certificate of a Judge, that Verdict was given contrary to Evidence, would not allow, that the Sheriff should bring in the Book of Freeholders to the Secondary for the ill Example; but ordered the Sheriff should return a good Jury in the new Trial.

48 return-
ed.

Upon Motion that the Cause to be tried at the Bar is of great Consequence, the Court will make a Rule for the Sheriff to return 48 Jurors upon the Jury. *Pract. Reg.* 329.

Who to
return the
Jury.

When a Trial is to be for a thing which concerns the Under-Sheriff, there the High-Sheriff shall return the Jury; (*sed Quare*); *aliter*, if the Trial concerns the High-Sheriff, the Under-Sheriff shall not return the Jury, but the Coroners. *Pract. Reg.* 338.

What

What manner of Persons shall not be impanelled on ^{8 Rep. 53.}
 Juries, and how they shall be discharged, and ^{6 Rep.}
 where they shall have Actions against the Sheriff ^{108.}
 for impanelling of them. ^{9 Rep. 49.}

The Sheriff ought not to return Privilege, to be Exempti-
 exempt from Juries; but he ought to summon, and ^{on not for}
 shall not be liable to an Action. *Siderfin p. 243.* Privilege.
The King and Percival; the Case was, *Venire fac'*
 was awarded to the Sheriff of the City and Coun-
 ty of Canterbury, to return a Jury here at the Bar,
 and upon the *Distringas* the Sheriff returns this *sur distrin-*
 to be an ancient City and County, and that the ^{gas, Ex-}
 King had granted to them an Exemption, not to ^{emption}
 serve in any Jury out of their City, except in ^{granted}
 Cases of High Treason; and by exprefs Words, ^{King.}
 that they should not serve *coram ipso Rege. Per Cur'.*

First, the Return is ill: Because, if it were in ^{III.}
 the Power of the Sheriff to return Privilege, he
 cannot do this upon the *Distringas* or *Habeas Cor-*
pus, as he did here; because by the returning of
 the *Venire*, (*viz.*) That there are *24 prob. & le-*
gales homines, he had concluded himself, there be-
 ing also Pledges upon every such Return.

Secondly, That the Sheriff may not return so at Privilege
 any Time, but ought to return them summoned, of Ex-
 and the Parties ought to come here; and then eve- ^{emption,}
 ry Person who had Cause of Privilege ought to ^{when to}
 claim here in Person, and not the Sheriff for them. ^{be claim-}
^{ed.}

More 883. 30. Waller's Case, Siderfin 293. The
King and Percival. The Court awarded an *alias*
Distringas, in regard the Sheriff cannot vary from
 the first *Venire* returned, but must have the same
 Men. *1 Keb. 867. Mesme Case.* And no Action
 lies against the Sheriff upon their Delivery of the
 Writ of Exemption. *Hardress, Rep. 389. Mesme*
Case.

But

Action on
the Case
against
the Sher-
riff for
returning
one ex-
empt.

But in the Town of *Darby*, and *Foxley's Case*,
1 *Roll. Rep.* 119, Action on the Case adjudged to
lie against the Sheriff, for returning one of a Jury,
who lived in a Place which is exempt; and *Co.*
Mag' chap. 382, 130, 447, 488, 461, Action on
the Case lies against the Sheriff, for returning a
Person exempt of a Jury.

What Ju-
rors the
Sheriff
must re-
turn.

The Sheriff must not return *magis remotos, mi-
nus sufficientes & magis suspectos*, by the Statute
W. 2. c. 38. and if he do, the Plaintiff or Deman-
dant shall recover Damages by the Statute, if he
be delayed, and the Defendant, if he lose his
Land, and *Articuli super chartas* gives double Da-
mages to the Demandant.

Not *ultra*.
70 *Annos*.

The Sheriff by Statute *W. 2. c. 38.* must not
return Men *decrepit, senes ultra 70 Annos, homines*
non in patria commorantes. This Statute is a direct

Notice.

The Sheriff, without giving Notice of Sickness, or *Non-
commorancy*; yet the Use is to sue out a Writ
grounded on this Statute, that he return them
not, and Notice by Word is good, if Notice were
requisite. *Co. 2 Inst.* 477.

Peers,
&c.

Peers of Parliament not to be impanelled, nor
Tenants in Ancient Demesne.

Who is
the Party
grieved
that shall
have his
Action.

Where the Demandant or Plaintiff is delayed
of his Suit, by such Return of the Sheriff, as *ma-
gis remotos*, he shall by the Statute recover Da-
mages against him; or where the Defendant, af-
ter he has lost his Land by the Oath of them so
returned contrary to the Form of the Statute,
and after he doth convict them in an Attaint, and
so is restored, he may then have his Action on
this Statute for his Damages. 2 *Inst.* 448. *sur Stat.*
W. 2. c. 38.

Freehol-
der in
York.

If one dwell in *Middlesex*, and had Freehold
in the County of *York* over 40 l. the Sheriff of
York

York may not summon him to *Middlesex*, to try a Cause at the Bar in *Westminster* for Land in *Yorkshire*, *W. 2. c. 42. 1 Rol. Rep. 163.*

In a Writ of Right, or any other Writ, a Baron Peer excused of the Realm may excuse himself.

Action on the Statute *W. 2. c. 8.* for returning Not re- Men more remote or suspected, Count and Bar more Per- inde. *Dr. Bonham's Case, 8 Rep. 118.* sons.

Upon a Trial between a Peer and another, the Peer, a Sheriff must return a Knight; but if he do not, Party. and the Peer doth not challenge the Array, but Knight the Jury give Verdict, he shall not have Advan- ret. tage of this afterwards. *Lord Powes and Kertman, P. 9 Car.*

A Jury was impanelled of the Town of Town of *Southampton*, and called to the Bar and made De- *Southamp- fault*, and the Men of that Town shewed to the ton. Court a Grant made to the Inhabitants of that Town, that no Return should be made of the Men of that Town to be of any Jury, and prayed the Allowance of their Charter; and the Court Allow- appointed them to plead their Charter, and so ance of they did. *1 Brownl. p. 36.* Charter.

If a Man has a Charter of Exemption, and Sheriff sheweth it to the Sheriff, yet he may return him, may not for the Sheriff is not a Judge to allow or disallow allow it. his Charter; but he must sue out a Writ of Allowance of his Charter, and deliver the Writ to the Sheriff, and shew his Charter to him; and then if the Sheriff return him, Action on the Case lies against him.

On a *Dorsetshire* Trial at the Bar, on Default Sheriff of all the Jurors but Three, it appeared, That counter- the Sheriff had by Command of the Plaintiff, mandsthe countermanded their Summons against the Gree Summons. of the Defendant, who now prayed a Trial: But this being impossible, for the Court in such Case will

No *Tales de Circum-*
stantibus
on Trial
at Bar.

will not supply the Jury with a *Tales de Circumstantibus*: But they offered to *nonsuit* the Plaintiff on Record, and conceived the Defendant should contribute to the Payment of the Jury, because they should remain indifferent Jurors. 2 *Siderfin* 77. *Hunt* and *Hollis*.

Precedent *London*.

Return of a *Distringas*, for Appearance of the Defendant in the Hustings. 2 *Sanders* 233.

Return of a Jury by the Bedels of the Four next Wards. 2 *Sanders* 244.

Issues.

Action.

Case a-

gainst

the She-

riff for

returning

two sever-

al Issues.

Aver-

ment a-

gainst the

Sheriffs

Return

of Issues.

What

shall be

said Issues.

If the Sheriff return but 40 *l.* which is the usual Issues on *Distringas Juratores*, the Court on Prayer of the Party cannot cause him to return greater; but only make a Rule, that good Issues be returned: But by *Twisden*, Action on the Case lies against the Sheriff, 1 *Keb.* 475. The Plaintiff ought to bring a Writ against the Sheriff on Averment, that he might have levied greater Issues, and so the Court may increase them.

Note, Before Stat. *W.* 2. c. 39. the Plaintiff could not aver against the Return of the Sheriff, if he returned too small Issues, for he is but an Officer in Court, and has no Day in Court to answer the Plaintiff Party: But now by 1 *Ed.* 3. the Plaintiff may aver what the Value of the Issues be, Rents of the Land, Corn in the Grange, Hay in the Barn, all Moveables except Riding-Furniture, and Utensils of the House.

Return of the Grand Inquest.

Indictment.

Scarlet's
Case.

Stat. 11 *H.* 7. c. 9. No Indictment shall be found by any Persons named to the Justices, without due Return of the Sheriff, but by Inquest of lawful Liege People returned by the Sheriff. One *Scarlet* whom the Sheriff had not returned, by Confederacy betwixt him and the Clerk who read the Panel, procured himself to be sworn of the Grand Jury, with Intent to indict his Neigh-

Neighbours maliciously, and he did so; he was adjudged an Offender within this Law, and by Statute 3 H 8. c. 10. The Justices of Gaol-Delivery, or Justices of the Peace, of whom one to be of the *Quorum*, in open Court may alter the Panel returned by the Sheriff to enquire of the King only, by Addition or Subtraction of any of the Jurors so returned, and they have Power to command the Sheriff, to put others in the Panel according to their Discretion. And the Sheriff ought to return the Panel, so reformed upon the Penalty of the said Act. So that none can be of any Grand Inquest, but by the Return of the Sheriff. Co. 12 Rep. Rob. Scarlet's Case.

Nota, By the Statute of 4 & 5 of William and Mary, all Jurors are to have 10 l. per Annum. *Vi- de postea.*

It is very needful for the High-Sheriff to have a Freehold-Book containing the Names of all the Freeholders in his County, and their Sufficiencies, that he may make the Panels according to his Oath, and better know Pledges and Sureties.

As for Issues lost for Default of Appearance, *sci- licet* by Jurors, or by Tenant or Demandant; the Sheriff may not levy till they shall be estreated under the Seal of the *Exchequer*, and the same delivered to him, for without Warrant he may not levy the same. 27 Ed. 1. c. 7.

Other erroneous Proceedings and Misdemeanors of Sheriffs, about and concerning Jurors.

After the Parties were at Issue in Trespass, and an *Habeas Corpus* awarded against the Jury, the Common Bench (in which the Action depended

*Superse-
deas re-
strains
the She-
riff from
returning
a Jury.* pending) awarded a *Superse-
deas, quia improvide,
&c.* which was delivered to the Sheriff, who not-
withstanding returned the Jury, and tried the
Cause. This was assigned for Error, and in *nullo
est erratum* pleaded; it was adjudged Error. For
the Error assigned is a Matter of Fact, depending
on a Matter of Record; and then the Defendant
by pleading *In nullo est erratum* had confessed this,

*What is
confessed
by plead-
ing In
nullo est
erratum.*

(that is to say) That such *Superse-
deas* was award-
ed and delivered to the Sheriff before the Trial.
Upon which it follows, That after the *Superse-
deas* delivered, the Hands of the Sheriff are closed,
that he cannot proceed to distrain the Jury, nor to
return the Writ before the Justices of Assize. It is
a manifest Error, if the Sheriff return the Writ of
Habeas Corpora at the Assizes with *Nisi Prius* af-
ter *Superse-
deas* awarded for staying the Return of
the Writ; as the Proceedings are erroneous in *Infe-
rior Courts* after *Habeas Corpus* delivered without a
Procedendo. *Yelv. p. 57. King and Andrews. Cro.
Jac. p. 43. King and Hill.*

*Reason-
able
Things
shall be
intended
to be done*

It is not necessary for the Sheriff to return the
Panel of the Jurors Name, but to say they are *de
vicineto* of such a Place; for so it shall be intend-
ed, and the Forms of all Returns of Jurors are so.
Pract. Reg. Tit. Return.

*A Stran-
ger re-
turned.*

In a Writ of *Error* eleven Jurors were return-
ed and one Stranger; yet because it was the
Return of the Sheriff, it shall not abate. *1 Roll.
Rep. 302.*

*Reason-
able
Things
intended
to be done*

The Statute of—*Eliz.*—provides, There shall
be two Hundredors in a Jury; yet it is never
seen that the Return of the Sheriff is so. So the
Statute of 42 *Ed. 3. cap. 11.* is, That the Sheriff
shall arraign the Panel in Assize four Days before
the Assize, yet it is never returned to be so done;
but such reasonable Things shall be intended to be
done,

done, unless the Contrary appear. 2 *Siderf. p. 144.*
Barclée's Case.

An Attorney was picked over the Bar, for giving Attorney
 Directions in Writing to a Sheriff to return Jurors **punished.**
 Names. *Mo. 882. n. 1237. Hanson's Case.*

Note, By the Statute of 4 & 5 *Will. & Mar. all Stat. 4 &*
 Jurors (other than Strangers, *per medietatem Lin- 5 W. &*
gua) returned upon Trial of Issues joined in the *M.*
 King's Bench, Common Pleas or Exchequer, or be-
 fore Justices of Assize, or *Nisi Prius*, Oyer and
Terminer, Gaol-Delivery or General Quarter-Sessi-
 ons of the Peace, shall have in their own Name or
 Trust within the same County 10 *l. per Annum*
 above Reprizes, of Freehold or Copyhold Land, or
 in ancient Demesne, or in Rents in Fee-simple, Fee-
 Tail, or for their own or some other Person's Life;
 and in *Wales* 8 *l. per Annum.* If any be returned
 of lesser Estate, he may be discharged by Chal-
 lenge, or upon his own Oath; nor shall a Juror's
 Issues be saved but by Order of Court, for reason-
 able Cause proved upon Oath.

The Sheriff, Coroner or other Minister re-Forfei-
 turning any Person of lesser Estate, shall forfeit *ture,*
 5 *l.* to their Majesties for every Person so re-
 turned.

They must be summoned six Days before the Summons
 Day of their Appearance, and none shall take a
 Reward to excuse a Juror's Appearance, on Pain to
 forfeit 10 *l.* to their Majesties.

This Act extends not to Cities, Boroughs or
 Towns Corporate.

of

Of Challenges.

Challenges.

A Challenge to the Jurors is Twofold :

To the { Array,
Polls.

To the Array, is to except against all the Persons impanelled : And as to this, there is a

Challenge { Principal,
or
for Favour.

Challenge to the Array

Note, That the Challenge to the Array is in Respect of the Partiality or Default of the Sheriff or other Officer that made the Return, and not in Respect of the Persons returned, where there is no Partiality or Default in the Sheriff. For if the Challenge to the Array be found against the Party that takes it; yet he shall have his particular Challenge to the Polls.

Affinity of Sheriff

If the Sheriff, or other Officers, be of Kindred or Affinity to the Plaintiff or Defendant, if the Alliance continue, 'tis a good Cause of Challenge. 1 *Bulstr.* 5, 6, 7, 8. *Earl of Salop versus Earl of Rutland.*

Sheriff's Cousin to Lessor.

Challenge was taken to the Array, because the Sheriff was Cousin to the Lessor in *Ejectment*, and concludes not to the Favour; it is a principal Challenge. And in *Roll. Rep.* 183. it is adjudged a principal Challenge: Yet in 1 *Roll. Abr.* 328. *Guest and Bridgman*, saith, It is not a principal Challenge that the Lessor is Cousin. But *Trin.* 1657. *B. R.* in the Lord *Brook's Case* it is a principal Challenge. *Cro. Jac.* 575. *Simonds and Walsh.* 2 *Roll. Ab.* 182.

Venire

Venire fac' was awarded to the Coroners on Lessor, Sheriff's Servant.
 Surmise, that the Lessor in *Ejectment* was Servant to the Sheriff. It was doubted, whether it was a principal Challenge, in 1 *Jac. Harbottle's Case*. Coke said, It was adjudged in 27 *El.* in *Packington's Case*, that it was not a principal Challenge; but in *Spicer's Case* it is resolved otherwise. *Cro. Jac.* 21. *Dyer* 7, 367.

If the Challenge be taken for Consinage, it ought Juror to be shewed *coment* Cousin; but in such Case Cousin. Challenge to a Juror is not necessary.

It is clearly a good Challenge to the Array, that Sheriff the Sheriff is Cousin to the Wife of the Defen- Cousin to Def.
 dant, though the Wife is no Party to the Action: Aver-
 But it must be averred that she was alive, or had ment.
 Issue at the Making of the Panel.

The Jury may try a Challenge for Con- Trial of
 nage of the Sheriff to the Plaintiff or Defen- Chal-
 dant, and sometimes the Coroners, or Attornies lenge.
 in Court, are Elisors. 2 *Roll. Rep.* 363. *Lloyd and Elisors.*
Williams.

If the Defendant challenge the Array, for that Sheriff
 the Sheriff is Cousin to the Plaintiff; it is no Coun- Cousin to
 terplea of the Challenge, that the Sheriff is also the Plain-
 Cousin to the Defendant; but the Array shall be tiff, &c.
 quash'd, because the Defendant first took the Chal- Array
 lenge. *Pasch.* 41 *El. B. R.* quash'd.

If any one or more of the Jury be returned at Array
 the Denomination of the Party, Plaintiff or Defen- quash'd.
 dant, the whole Array shall be quash'd.

If the Plaintiff or Defendant have an Action of Upon
Battery or *Debt* against the Sheriff, or if the She- Sheriff's
 riff have Parcel of the Land depending on the same Account,
 Title; or if the Sheriff or his Bailiff be either of
 Counsel or Attorney, or Servant or Gossip of ei-
 ther Party, all the Array shall be quash'd.

The Office and Duty of Sheriffs, &c.

- Elifors.* A Prayer to *Elifors* in Trials at Bar may be at the Suit of the Defendant or Plaintiff; but in *Nisi prius*, at the Prayer of the Plaintiff only.
- Principal Causes. Consanguinity or Affinity are the principal Causes; but it is no Challenge to the Array, if all the Jurors be of Affinity.
- To the Array touching Sheriff. Challenge to the Array for Favour, That the Sheriff is Servant to the Plainriff, or was Arbitrator for a Party: That the Sheriff purchased Part of the Land in Question: That one Party is Tenant or Servant to the Sheriff.
- For Malice. Malice between the Sheriff and one of the Parties, is good Cause of Challenge, That one of the Parties has brought an Action of *Debt* against the Sheriff, &c. but not that the Officer has Debt against the Party; for he may demand his Debt without Malice.
- Triers. But this Kind of Challenge being no principal Challenge, must be left to the Conscience and Discretion of the Triers.
- Chal. to the Poll. 2dly, *Challenge to the Polls, i. e.* to the particular Jurors; and these are of four Sorts.
- Peremptory. 1. Peremptory, without shewing any Cause; and this for Treason is 35. Felony 20.
- Principal 2. Principal Challenge to the Polls; so called, because it stands of it self, without leaving any Thing to the Conscience or Discretion of the Triers. Now this is such Matter as proves evident Favour or Enmity in the Juror.
- Propter respectum.* And this is, *Propter respectum*; as the Nobility may be challenged, or he may challenge himself.
- Defectum.* *Propter defectum*, as Aliens, Villains; not having Freehold sufficient; not having two Hundredors.
- Affectum.* *Propter affectum*, as Jurors of Kin or Blood to either Party; that he has formerly tried the Cause; Counsel, not a Commissioner for Examination of Witnesses; Fellow-Servant; for Favour; *Propter Delictum.* *delictum*, as Outlawed, &c.

3. Challenger to the Poll must shew Cause pre-Cause. sently. After one hath taken Challenge to the Poll, he cannot challenge the Array.

4. If the Plaintiff alledge a Cause of Challenge Cause. against the Sheriff, the Process shall be directed to against the Coroners; and if any Cause against all the Sheriff or Coroners, then the Court shall appoint Elifors. Elifors. Sometimes two of them that be impanelled.

When any Challenge is made to the Polls, two Triers. Triers shall be appointed by the Court.

Note, All Challenges must be taken before the When taken. Jurors are sworn.

No Challenge shall be admitted against the Tri-Triers. ers, appointed by the Court.

There may be a Challenge to the Panel by After a Exception to the Sheriff, after a *Tales* prayed to *Tales*. him: So after a *Venire fac'* prayed to him, tho' the Cause of Challenge were before the Prayer. *Hob. p. 235.*

Upon a Writ of Error the Record was certified, Error. That the Challenge was to the Sheriff for Cosinage, and after a *Venire fac'* awarded to the Coroners, upon the Diminution it may not be certified, That Diminu- the Challenge of the Cosinage was after the Re- tion. turn of the *Venire fac'*; because this is contrary to the Record before certified. 1 Roll. Abr. 764. *Floyd and Bethell.*

That the Sheriff was *quondam* Servant to the Defendant, Earl of Rutland, is no principal Chal- *Quondam* Servant. lenge, it is past and executed. *Aliter*, had it been so at the Time.

To say, That between the Sheriff or Officer that *Transf. int* returns the Panel, and one of the Defendants, *Vic' &* there was an Action of *Trespas* then depending, is *Def.* a principal Challenge.

C H A P. XIII.

Of the Writ of Enquiry of Damages, and the Sheriff's Demeanor therein, and in what Cases a new Writ shall be granted or not. By whom to be executed. The Time of executing it. The Form of the Return of Writ of Enquiry of Damages.

Vide sub tit. Waste.

A new
Writ
granted.

IF upon the executing of a Writ of *Enquiry of Damages*, the Sheriff refuseth to swear and examine some of the Witnesses produced on either Part, and yet doth execute the Writ; the Court will grant a new Writ to the Party grieved, for the old Writ was not well executed. *Pract. Reg.* 662.

A Writ of *Enquiry of Damages* directed to the Sheriff, cannot be executed by a Bailiff of a Liberty. *Hob. p.* 83.

Amend-
ed.
Quashed.
Superse-
ded.

A Writ of *Enquiry of Damages* varied in the Return from the Award upon the Roll, which was amended and made agreeable to the Roll. *Mo.* 711. n. 998. A Writ of *Enquiry* cannot be quashed, till it be returned and filed; but before the Return it may be superseded, *quia erronee emanavit*; per Holt, 6 *Mod.* 40. And by him you cannot except against a Juror upon Executing a Writ of *Enquiry*. *Ibid* 43.

As to Time of Executing it.

If a Writ of *Enquiry of Damages* be returnable *Ostabis Michaelis*, the Sheriff may take the Inquest and enquire the Damages the Day of the Return, and if he returns it the same Day; this Writ
is

is well executed. *Trin. 38 Eliz. B. R. Gawen and Ludlow.*

If on a Writ of *Enquiry of Damages* the Inquest be impanelled the *Effoin-Day*, and the Jury then hear the Evidence two or three Days after; yet this is well executed. *Mich. 11. Car. 1. B. R. Stainby and Waterman.*

A Writ of Enquiry was returnable *Tres Trin.* which happened to be on a *Sunday*; so that the *Effoins* were kept on the *Monday*, the Writ was returned to have been executed on the 14th of *June*, which was the *Monday*, i. e. the Day after the Return. And *per tot. Cur.* although without Doubt a Writ may be executed on the Day of its Return; yet if that Day be such as it cannot legally be done on, you shall not do it the next Day. *Harvey versus Broad. 6 Mod. 160.*

Return of a Writ of Enquiry of Damages.

Executio istius brevis patet in quadam inquisitione huic brevi annex'.

I*nquisitione indentat' capta apud C. in Com' War' (tali die & Anno) coram A. B. Armig', Vicecom' ejusdem Com', Virtute cujusdam brevis Domini Regis eidem Vic' direct' & huic inquisitioni consut' per Sacrament' R. S. F. G. &c. (ad numerum 12 Jurors) qui dicunt super Sacramentum suum quod A. P. in brevi Inquisition' huic consut' nominat' sustinuit damna occasione (Transgress. prædict') per H. in præd' brevi nominat' prout in eodem brevi fit mentio ad 40 s. & pro mis' & custag' ipsius A. P. per ipsum circa sectam suam in hac parte appositis ad 40 s. In cujus rei, &c.*

In this Writ, to enquire of Damages in *Tres-* No Da-
pass, the Jury cannot find that no *Trespas* is done. mages
P 3 Nei-found.

The Office and Duty of Sheriffs, &c.

Neither may the Sheriff make such a Return; but if the Jury will find no Damages, the Sheriff must make his Return accordingly.

C H A P. XIV.

Where and in what Cases the Sheriff's Return of a Devastavit shall be good or not, and the late Practice in such Cases.

Sheriff concluded to make Return contrary to the Verdict.

THE Defendant pleads *plene Administravit*, and Verdict is for the Plaintiff; this estops the Sheriff of the County where the Trial was, to return *Nulla bona*, for he is concluded by the Verdict to make any Return contrary to it; but the Sheriff of another County shall not be so concluded. But the Sheriff of the County where the Writ is brought ought to return a *Devastavit*, and thereupon the Plaintiff shall have Process into another County. 2 Leon. n. 90. p. 67. Noon's Case. 1 Andersf. 32.

Testatum.

And the Question further was, If a *Testatum* shall issue into another County, before the Sheriff of the County where the Writ was brought had returned a *Devastavit*, and not resolved; but without doubt it is the safer Way to do it upon the Return.

Debt found assigned to the Queen.

The principal Case was; Debt in London against an Executor, upon *plene Administravit* it was found for the Plaintiff, the Plaintiff assigned the same to the Queen, and a *Scire fac'* issued out of the Exchequer against the Defendant, &c. into the County of D. and the Sheriff returned *Nulla bona*, &c. which was not good, *causa qua supra*, though the Debt was well assigned. And upon a *Constat* of Goods in another County, he may well have

have a *Scire fac'* into another County. 2 Leon. n. 90. Bendl. 23.

But where Executors plead *plene Administravit*, it Assets was found they had Assets, and a *Fieri fac'* issued found and to the Sheriff, who returned that they had not any returned Thing within the County. *Per Cur'*, It is a good *quod nihil in Com'*. Return, because the Jury, it may be, found Assets in another County; so the Verdict shall not bind the Sheriff. 2 Brownl. Rep. p. 116. Morgan and Took.

If it appear by the Defendant's Plea that he hath When the Assets in his Hands, and if the Sheriff cannot levy Sheriff the Debt in the Defendant's Hands, he may upon may re- the Defendant's own Shewing (without any Da- turn De- mage) return a *Devastavit*; and if Judgment be *vastavit*. given against an Executor on Demurrer, and Execution awarded, the Sheriff cannot return *Nulla habet bona Testatoris*. But it is a *Devastavit* if it be found against the Executor by Verdict. Cro. Eliz. 102. Stubs and Rightwise.

Judgment was given in *Banco de bonis Testatoris*, Special and *Fieri fac'* issues out; the Sheriff returns *Nul- Scire fac'*. *la bona*; the Plaintiff may have a Special *Fieri fac'*, That the Sheriff shall levy the Debt of the Goods of the Dead, and *si sibi constare poterit*, that the Faux Re- Executors have wasted them, then *de bonis propriis*; turn, and and if the Sheriff makes a false Return, the Party Action may have an Action on the Case. But if upon the lies. Return of *Nulla bona*, and a *Quia testatum est*, that they have wasted, a Writ of Enquiry is awarded what Goods were wasted, and it is found that Goods *ad valentiam* of the Debt were wasted, and upon that *Scire fac'* to have Execution *de bonis propriis* upon two *Nichils* returned; this is erroneous, and if the Inquisition be false, the Party hath no Remedy, and upon two *Nichils* returned the Defendant shall be condemned; yet perhaps he had not Notice. 5 Rep. Pettyfer's Case.

A like
Case.

To that Purpose is a Case in *Littleton's Reports*, Judgment was given against the Executor, and Execution awarded; and the Plaintiff informs the Sheriff, That the Executors have wasted the Goods of the Testator; but the Sheriff would not return a *Devastavit*. *Henden*, Serjeant, moved for a Commission, to enquire whether the Goods were wasted; and if it be found, then the Sheriff might return a *Devastavit* without Peril. But the Judges said, they would not advise, because it was a new Course. *Lit. Rep.* 47.

Scire fac'
de bonis
propriis.
shall not
be awarded
upon
the Surmise
of the Party,
but on the
Return
of the
Sheriff of
a *Devastavit*.

But in *Aldworth* and *Peel's Case* it was resolved. There Debt was brought against *Peel* as Executor, the Plaintiff had Judgment to recover *de bonis Testatoris*; and thereupon a *Scire fac'* was awarded, and the Sheriff returneth *quod nulla habuit bona Testatoris*; and the Plaintiff surmifeth, that he had wasted the Testator's Goods; whereupon he prayed a *Scire fac'*, why he should not have Execution *de bonis propriis*. And *per Cur'*, this Writ shall not be awarded upon the Surmise of the Party of a Devastation, nor in any Case where the Judgment is *de bonis propriis*; unless it be on Return of the Sheriff, where he returns a *Devastavit*. *Cro. El.* 530. *Aldworth* and *Peel*.

Upon a
Special
Return
the Husband
charged
for the
Conversion
of the
Wife.

If *A.* recovers against *B.* Debt and Damages, and after *B.* died, and Administration is granted to *C.* his Wife, who wastes the Goods, and after takes *D.* to Husband, and a *Fieri fac'* is awarded *de bonis Testatoris* in the Hands of *D.* and *C.* and the Sheriff returns *Nulla bona*, &c. and upon this, on Surmise that they have wasted the Goods, another Writ was awarded to the Sheriff, *Si sibi constare poterit per Inquisition'*, that they have wasted the Goods, then to warn them to shew Cause why Execution should not be *de bonis propriis*, and so an Inquisition is taken. And the Sheriff returned, That they had not in their Hands any of the Goods

of the Intestate ; but that the Feme being Administratrix of her first Husband, had Goods of the Value of 100*l.* of the said Intestates, and had wasted them during her Widowhood, and the Husband had not wasted any of them. *Et si devasterunt* according to the Writ, the Jury pray the Discretion of the Court. *Per Cur'*. This Special Return of the Sheriff is good, and by this the Husband is to be charged for the Conversion of the Wife. *Cro. Car.* 600. *King and Hilton.*

The Sheriff returns a *Devastavit* (no Assets over being in Question) on *Non est factum* against an Administrator by *Fieri fac'* with a *Scire fac'*. *Per Faux Recur'*, Though it be a false Return we cannot help turn it, but it is at the Sheriff's Peril. 3 *Keb.* 530. *Brown and Collins.*

On *Fieri fac'*, with a *Scire fac'* and Assets, the Traverse Sheriff returned Waste, and the Defendant pleaded wanting. *plene Administravit*. The Plaintiff demurred, because the Point of the Inquisition is not traversed, and Judgment *pro Querente*.

Debt against an Executor, and a Recovery by Verdict, and Judgment upon this, and a *Fieri fac'* *de bonis* of the Intestate ; upon which a *Devastavit* was returned, an *Elegit* issues *de bonis propriis*. *Mo.* 299. n. 446. *Mead and Cheney.*

If *A.* recover against *B.* and Execution *de bonis* How the *Testatoris, si non, de bonis propriis*, and the Sheriff Party upon a *Fieri fac'* levies the Monies, and after to may discharge another *Fieri fac'* to him directed, returns a *Devastavit* ; and upon this a *Scire fac'* is granted against *B.* to shew Cause, &c. *B.* may discharge himself of this *Devastavit* by Plea, that the Sheriff levied the Money upon the first *Fieri fac'*. a Devastavit by Plea. 1 *Roll. Abr.* 903. *Middleton and Powell.* See the 3d Resolution in *Rock and Leighton's Case.* 1 *Salk.* 310.

The

*The Case of Rock versus Leighton. Mich. 12. W.
3. B. R. was thus.*

Judgment against an Executor, &c. by Confession or Default is an Admission of Assets, and he is estopped to say the contrary on *Devastavit* returned, and so is a Jury.

Devastavit may be returned on a *Fi. fa.* without Enquiry.

An Action was brought against a Sheriff for a false Return of a *Fi. Fa.* against an Administrator, *de Bonis intestati*, & on *Non cul.* Verdict for the Plaintiff, and a Case was made for the Opinion of the Court, *viz.*

The Plaintiff being an Administrator, was sued by *A.* and pending the Suit, let Judgment be obtained against him by *B.* but did not plead that Judgment in Bar of the Action, yet sold the Intestate's Goods to pay *B.* *A.* recovered Judgment, and sued a *Fi. Fa.* on which the Sheriff levied Part, and as to the rest returned a *Devastavit.*

Argued pro Quer. That the suffering Judgment by Default was no Confession of Assets, and that the Sheriff ought not to have returned a *Devastavit* on the *Fi. Fa.* but a *Nulla bona*, and that thereupon there ought to have been a *Scire Fieri* Enquiry: But *per Curiam.*

1. The Sheriff may return a *Devastavit* on the first *Fieri Fa.* if he will; 'tis at his Peril if false, and the Enquiry is only for his Safety.

2. If an Executor confesses, or suffers Judgment by Default, he admits Assets, and is estopped to say the contrary.

3. That he might have pleaded the first Judgment obtained by *B.* against the Action of *A. et riens ultra*, but having not done it, he has confessed he has Assets to answer the Judgment in this as well as the first Action; and if a *Scire fac' Inqr'* had been awarded on the said Judgment, and a *Devastavit* returned, and *non Devastavit* pleaded, the Administrator could not have given in Evidence the first Judgment, because he had not pleaded it when he might, so no Occasion for an Enquiry; nor is he in-

injured by the *Ret. of Devastavit* on the *Fi. Fa.* since it could not have been avoided if there had been an Enquiry.

4. The Administrators not pleading the first Judgment, & *nihil ultra*, when he might, is an Admission of Assets as to the second Judgment, so that he has slipped his Time and is estopped; and so are the Jury, and their Verdict is void, and the Sheriff shall take Advantage of all Estoppels between the Parties. As if an Action be brought against a Feme Sole, and she marries, and Judgment is against her as Sole, and Execution thereon, and the Sheriff takes her by that Name, she is estopped to say the contrary. *Vide Dyer. 57. 2 Sid. 70.*

See a Precedent for Return of a *Fieri fac'* upon a *Devastavit*, *Dyer 222.*

But now the Practice is more nimble than by the most tedious Inquisitions, and that is, by bringing an Action in the *Debet* and *Detinet* against an Executor, suggesting a *Devastavit* in his Declaration, without any Return of the Sheriff. *Siderfin 397. Wheatby and Law.*

On a Fieri fac' in a Scire fac' to have Execution de bonis propriis.

Sheriff returns upon Inquisition, That the Defendant (Administrator) *habuit bona & catalla in Scire fac' manibus suis, quæ fuerunt del intestate tempore mortis sue ad valentiam debiti & damnorum recovered by the original Judgment; and that the Defendant bona & catalla illa ad valentiam debiti & damnorum prædicti vendidit & elongavit ac in usum suum proprium convertit & disposuit.* Defendant at the Return of the Writ comes in, & *protestando* that he had fully administered, for Plea he saith, *non vendidit seu elongavit, &c. Et hoc, &c.* Plaintiff replies, That the Defendant *vendidit & elongavit, &c.*

The Office and Duty of Sheriffs, &c.

&c. and found for the Plaintiff, *per Cur'*, though this is no apparent Issue, (but whether *Devastavit vel non*) for the Defendant might pay Debts with his proper Monies, and that he might dispose of the Goods to his own Use; yet it is good after Verdict. For the Writ of *Scire fac'* suggests, That the Defendant *bona & catalla, &c. disposuit ea intentione quod dicta executio non fieret.* 1 Sand. 306. *Merchant and Driver.* And it is the Defendant's own Fault to take such an Issue; for he might have taken Issue, that he had not Goods of that Value, or that he had paid any special Debt.

C H A P. XV.

Of Prisons, to whom they belong, and the Place where kept. Who may be Keeper of Gaols, &c. and how forfeitable. Of the Sheriff's of London's Prison, and of the Marshalsea, and the Grant thereof. Of the Sheriff's Demeanor towards Prisoners. Of the Prisoners Misbehaviour, and what Payment of a Debt to a Gaoler shall be good, or not, and of those that break Prison.

Of Prisons, &c.

ALL Prisons are the King's; but a Subject may be Keeper. Co. 2 Inst. 100, 580.

County-Gaol in-
separable
to the Of-
fice of
Sheriff.

The Custody of County-Gaols is incident to the Office of Sheriff, and inseparable from the Sheriff; and therefore if the King grant the Custody of such a Gaol to another, it is void: For the Sheriff is the immediate Officer of the King's Courts, and shall be answerable for Escapes, and be subject to Amerciaments, and therefore he shall put in such Keepers as he shall answer for. 4 Rep. 34. *Mitton's Case.* 14 Ed. 3. c. 10. & 19 H. 7. 10. 23 H. 8. 2.

The

The Sheriff may remove his Gaol from one Place to another within his Bailiwick. And the Sheriff may hold the *Affizes* in the Castle where he held them there by Prescription, altho' the King grant the Custody of the Castle to another. So that tho' the Sheriff may keep the Gaol in what Place he will within his Bailiwick, yet in a particular Place not without Prescription. *Hob. p. 202. Anderf. 345.*

Infants or Feme-Coverts are Keepers of Gaols, to charge them in Execution for an Escape. 2 *Inst. 382. &c.*

As the King may by his Letters Patent make a County, so he may in the Making of it, save and except to him and his Successors such Part of the Jurisdiction or Privilege, which the other County (from which it is exempted) had in it before. As in many Places in the Realm, the Gaol of a Town, which is a County of it self, or a Place privileged from the County, is the Gaol of the County, and the Place where the Affizes or Gaol-delivery is holden, is within the County of the Town, and yet serves also for the County at large: As in the Sessions-Hall at *Newgate*, which serves as well for the County of *Middlesex*, as for *London*, and yet it stands in *London*; but by Usage it hath been so. And so the Gaol of *Berry*, &c. *Poph. p. 16. The Berry. Case of the Town of Gloucester.*

Though *Newgate* is a several Prison both for *London* and *Middlesex*, yet a Prisoner in *Newgate* in *London* Side shall not be charged with Actions in *Middlesex*. *Dalt. 530. 17 Jac. Tit. Execution. 894.*

The Sheriff's of *London's* Court is moveable, and the Sheriff is chargeable with a Prisoner while he is in Prison, tho' he be Judge also: For why should the City Serjeants give Security to the Sheriff, unless the Sheriff be the Officer? And it hath been ruled, That altho' the Sheriff be Judge, yet a Precept is directed to him. Therefore it is a good Plea in Debt on Escape, That the Sheriff commanded the Serjeant

at

The Office and Duty of Sheriffs, &c.

at Mace to deliver the Prisoner to him. *Siderfin*, p. 318. 2 *Keb.* 141. *Husband* and *Cole*.

May
make
their
Houses
Prisons.

Note, The Sheriffs of *London* may make their Houses their Prisons, as well as the Compters: And the bringing the Person arrested to the Sheriff, albe- it it be *sub die*, and not into any House; yet it is as good as delivering into the Sheriff's Prison. *Vide infra*.

Who
shall an-
swer E-
scapes.

Note, Upon Forfeiture, the Custody of a Prison is given to another, and yet till he is actually remo- ved he shall answer for all Escapes, and he that occupies the Gaol by *Tort* shall answer; and actual Escape lies against him who had Possession at Will. 11 *H.* 7. 23. *Dyer* 274.

Responde-
at superior.

But if he be not sufficient, *Respondeat Superior*. 9 *Rep.* *Reynald's Case*. *Vide supra*.

Marshal-
sea.

Grant by Patent of the Office of the *Marshalsea* of the King's Bench for Years is not good, for the Inconveniencies that might ensue; it may thereby become in Suspence upon *Probat* of a Will, till Ad- ministratation committed thereof; and it might fall to Persons insufficient; and in Case of Fee or Tail it descends to an Infant; the Court puts a fit Person in for the Time. *Cro. Car.* 587. *Meade versus Sir J. Lenthall*.

See an Inquisition returned by Commissioners, touching the Forfeiture of the Office of Marshal. *Brownl. Rediv.* 375, &c.

The Marshal turned out for Non-Attendance. 6 *Mod.* *Farsly* 50, 57, 91.

Vid. more of the *Marshalsea*. 9 *Rep.* *Sir G. Reynold's Case*. 10 *Rep.* *Case of the Marshalsea*. 6 *Mod.* 253. 1 *Salk.* 213.

Marshal
in Exe-
cution.

Marshal of the *King's Bench* shall not be privi- leged from Execution. But if the Court do grant in

in Execution, it is an Escape as to all the Prisoners; but they may make a new Marshal, and then take him in Execution. *Siderfin p. 68.*

By *Hyde* Chief Justice of B. R. The Court *Informar* cannot sequester the Marshal's Office, for not pay- *versus le* ing a Debt due to any private Man. But by *Wind-Marshal* *ham*, an Information may be against the Officer, for this ill using his Office to shift Mens Debts, and on that the Court may sequester. So on any Contempt by him. 1 *Keb. 846. Roberts versus Sir J. Lenthall.*

Attorney of B. R. brought Trespass against the Warden Warden of the *Fleet*, who advised with the Court of the of C. B. that he being an Officer of this Court, *Fleet must* ought not to be impleaded elsewhere. *Per Cur'*, *answer* It is Equality of Liberty, and he that first begins the *B. R.* Suit shall have the Privilege; and so he was advised to answer. 2 *Leon p. 41. Povey's Case.*

G. brought Action of Debt against the Warden Where by a Bill of *Privilege*, but he would not appear; the War- and the Court were in Doubt what Remedy the *den would* Plaintiff hath to compel the Defendant to appear; *not ap-* for he cannot be forejudged the Court, because he *pear.* had Estate of Inheritance in the said Office: But the Warden having made a Lease of his Office for three Years, he shall nor have his Liberty. 2 *Leonard. 173. Gittonson's Case.*

As for Gaols which have been granted in Fee, Forfeiture of Life, or which have been held by Prescription, *ture of* may be forfeited several Ways. *Gaols.*

Where the Gaoler detains a Prisoner after Fees paid, the King may seize the Gaol. 2 *Inst. 43, 53.*

Of the Sheriff's Demeanor towards Prisoners.

Britton, c. 11. saith, No Prisoner shall be put in Who to Irons, but Traitors, or those taken for Felony or be put in *Trespass in parcis & vivariis*, or which shall be *Irons.* found

The Office and Duty of Sheriffs, &c.

found in Arrears in Account before they be attainted. *Vide 1 Ed. 3. c. 7. Dalt. 465.*

Murder in the Gaoler. And therefore where a Prisoner, by Durefs of the Gaoler, comes to an untimely End, it is Murder in the Gaoler. 3. *Inst. 52. 91.* And the Law implies Malice in him in Respect of the Cruelty.

To be enquired by the Coroner. And if a Man die in Prison, the Coroner ought to sit upon him, to the End it may be enquired, if he came to his Death by the Durefs of the Gaoler, or otherwise. 3 *Inst. 91. 52.*

Sheriff mis-executing Criminals. If the Sheriff, or other Officer, where he ought to hang the Party attainted, according to his Judgment and his Charge, will (against the Law) of his own Wrong, burn or behead him, &c. the Law in this Case implies Malice in him, and 'tis Murder.

By the Statute of 14 *Ed. 3. c. 10.* If a Keeper, or Under-Keeper of Prisons, by too great Durefs of Imprisonment, or by Pain, make a Prisoner become an Appellor, (*viz.*) an Approver against his Will, it is Felony. *Dalt. 466.*

Duritia. Every Imprisonment is in Law *duritia, durefs*; a little Addition to it by the Gaoler, is too great Durefs in this Case.

An unruly and mischievous Prisoner may be indicted, &c. There is a remarkable Case in 3 *Bulstrode*, The Court was moved by Sir G. Reynell against one of his Prisoners, who had much misbehaved himself, offered to escape, and had endangered the Killing of one of his Servants, and that he had spent ten Pounds after him; and he would have had the Court to have fined him. But *Per Cur'*, We will not do it; you must keep him in *arcta custodia* in Irons, and you may indict him for these Misdemeanors, and by that Way you may have him fined. 3 *Bulst. 245.* Sir G. Reynell's Case.

The

The Payment of a Debt by a Prisoner to a Gaoler is not good; and therefore in Debt the Defendant pleads, that he was a Year in Execution, and the Plaintiff could not be found, whereupon he paid the Money to the Gaoler. The Plaintiff replies, That he was to be found at *D. absque hoc*, that he absented *eo animo*, to keep the Defendant in Prison. And the Defendant to this demurs, because the Marshal may die, and no Recovery can be by the Defendant against the Marshal, if he do not pay it over. But the Court gave Judgment for the Plaintiff; it being not reasonable to pay Money to the Gaoler for the Plaintiff, whether he will or not. And also, they thought it too hard for the Plaintiff to prove Payment, or to prove Assets in the Hands of the Marshal's Executors. 3 *Keb.* 748. *Taylor and Barker.* Sir *Tho. Jones's Rep. mesme Case.*

Where the Imprisonment is unlawful, the Prisoner is not to pay for his Diet. 1 *Roll. Rep.* 329. *Oliver's Case.*

Note, If a Prisoner is in Execution, and the Gaoler, Gaoler or Sheriff die, he is in Abeyance *&c.* dies. and Custody of the Law. 3 *Rep. Westby's Case.*

A Gaoler is not bound to deliver his Prisoner, Fees to who is discharged by the Court, until he pays his be paid. due Fees.

A Prisoner acquitted of Felony, the Gaoler Bar-Fee. may take Twenty Pence, which is called a Bar-Fee.

Every Sheriff, Bailiff of Franchise, and every Kalendar other Person having Authority of keeping Gaols, of Prisoners.

The Office and Duty of Sheriffs, &c.

or of Prisoners for Felony, shall certify the Names of every such Prisoners, in their Keeping, at the next General Gaol-delivery in every County or Franchise where such Gaol is, there to be kalendred before the Justices of the Delivery of the same Gaol, whereby they may, as well for the King as the Party, proceed to make Delivery of such Prisoners according to the Law, on Pain of five Pounds. 3 *H.* 7. 3.

Escapes. If the Gaoler shall suffer an Escape, the High-Sheriff or Gaoler are chargeable therefore. See *Chap.* 21. concerning Escapes.

And see and note the Intention of the late Statute, touching Escapes and Escape-Warrants. 6 *Mod.* 21, 22, 63, 95, 154, 253, 254, 301, &c. 2 *Salk.* 252, 626.

C H A P.

C H A P. XVI.

When one may be said to be in Execution or not.

And when without Prayer or not. In what Cases the Sheriff may break open an House to do Execution or not. To what Sheriff, and of what Place and County shall Execution be awarded: Of a Cap' ad satisfaciend' for what and against whom it lies, and the Sheriff's Demeanor therein, and Returns thereupon.

Of Execution:

When one may be said to be in Execution, or not.

When one shall be in Execution without Prayer of the Plaintiff, or not.

IF a Man recover Damages in Action on the Case ^{Prayer of the Plaintiff.} against J. S. in the King's Bench, the said J. S. being in Custod' Mareschal'; yet he shall not be in Execution on this Judgment, although it be within the Year, before Prayer of the Plaintiff; for the Marshal may not take Notice of every Judgment against every Prisoner; but upon Prayer of the Plaintiff, a *Committitur* shall be entred upon the Roll, and then he is in Execution; but if the Defendant, being taken in Execution, be brought in by *Habeas Corpus*, and then an Entry of the *Committitur* is made in the Book of the Office, it is good. *Hill. 12 Jac. B. R. Sir Henry Bellows and Hanford. 2 Roll. Rep. 112.* ^{Where a Committitur.}

Hab. Corp.
to bring
Prisoner
into
Court.

If a Man recover in *B. C.* Debt and Damages against *J. S.* and hath Judgment, altho' that *J. S.* be a Prisoner in the *Fleet* for other Causes (which is the Prison of the Common Bench) and the Warden informs the Court of it, and the Court commands him to retain him in Execution until Satisfaction of the Judgment; yet he is not in Execution, because he was not brought to the Bar by *Habeas Corpus*, and viewed and demanded of the Prisoner, if he be the same Person, who is condemned or not; and it is the Office of the Court to oppose him. *Dyer* 13, 14. *Eliz.* pag. 506. pl. 63. So if the Warden inform the Court of Chancery, that *J. S.* (which is Prisoner there on a Judgment) is in his Ward for certain Causes, on which the Court commands the Warden to return him in Execution, until Satisfaction of the Judgment; yet *J. S.* is not in Execution upon the Judgment, because this was not done at the Request of the Plaintiff, but without his Prayer, for it may be he will elect another Execution. *Dyer* 63, 306.

**Marshal-
lea.**

In Debt against *J. S.* if the Defendant be taken upon a *Latitat*, and committed to the Marshal for Default of Bail, and after the Plaintiff recovers against him, he continuing in Prison; yet he shall not be in Execution for this Judgment before the Prayer of the Plaintiff. *Mich.* 4 *Jac.* *B. R.* *Car.* and *Copping*.

**On Cap.
Utlagat
within a
Year.**

If a Man recover in Debt, and outlaw the Defendant after Judgment, and after within the Year, the Defendant is taken by *Cap' Utlagatum*, he shall be in Execution for the Plaintiff before Prayer, because the Outlawry was at the Suit of the Party. 5 *Rep.* 88. *Garnon's Case.* *H.* 41 *Eliz.* *B. R.* *Bonner* and *Stackley*. Otherwise it is, if he be taken in Execution after the Year, because in that Case he may not have any *Capias* against him,

**After the
Year.**

him. *Hill. 38 El. B. R. Norton and Sharp.* But if ^{In Debt} a Man outlaw the Defendant in Debt after Judg-^{after} ment, and after within the Year the Defendant is Judg- taken by *Cap' Utlagatum*, although he be in Exe- ment. cution for the Plaintiff *prima facie*; yet he may make Election, that it shall not be an Execution for him. 44 *Eliz. B. R. Shaw and Cutter.*

If Execution by Default be awarded in a *Scire fac'*. *Scire fac'* upon a Judgment in Debt, and the Defendant four Years after was in the Fleet for other Cause; and by *Habeas Corpus* he was brought up to the Common Bench, and being opposed by the Court, if he were the Person who was condemned, *ut supra*, and he grants it, he shall be committed Tho' af- in Execution at the Prayer of the Plaintiff as ^{ter the} Year and it seems, though it be after the Year and Day. ^{Day.} *Dyer 147, 214.*

If *A.* recover against *B.* by Judgment in the Error King's Bench, and upon this *B.* renders himself to ^{and no} Prison, and after brought a Writ of Error, and had ^{Bail} a *Superfedeas*; yet after, upon Prayer of the Plain- ^{found.} tiff, the Court may commit him in Execution, altho' that the Record be removed; forasmuch as he had not found Bail upon his Writ of Error. *Pasch. 9 Car. 1. B. R. Symond's Case.*

How, and in what Cases the Sheriff may break open Vide antea. an House to do Execution.

The leading Case in this Point is *Semaine's Where* Case, reported by my Lord Coke in 5 *Rep.* and in the She- Croke's *Eliz. 98.* out of which I shall collect these ^{riff may} following Resolutions. ^{break} ^{open an} ^{House.}

The Case was,

‘ A Joint Termor of an House with *B.* dies,
 ‘ being bound in a Statute. The Sheriff returns
 ‘ him dead; Conusee sues another Writ to extend
 ‘ his Lands, which he had at the Time of his
 ‘ Death or after, and what Goods he had at the
 ‘ Time of his Death: The Sheriff impanels a Ju-
 ‘ ry to enquire what Goods, &c. and it was
 ‘ found there were divers Goods of the said de-
 ‘ ceased at the House of *B.* in *London*: And the
 ‘ Sheriff came with the Jury to view, appraise
 ‘ and seize them for this Debt, and the (Defen-
 ‘ dant) Surviving Termor, *præmissorum non igna-*
 ‘ *rus* shut the Door, and disturbed him to make
 ‘ Execution.

It was resolved,

On Habere fac’ posses- First, Upon Recovery the Sheriff may break
sionem. open an House, and deliver it to the Plaintiff;
 for the Writ saith, *habere fac’ seisinam*, or *possessionem*. And after Judgment, it is not the House of
 the Defendant in Right.

Ca. Sa. Secondly, Upon a *Capias ad satisfaciend’*, the
 Defendant may not break open any Man’s House
 to make Execution; but in all Cases, when the
 Door is open, the Sheriff, may enter to make Exe-
 cution of Body or Goods.

Hue and Cry. Thirdly, In all Cases where the King is Party, so
 on *Hue and Cry*, if no Door be open, the Sheriff
 may break open the House to take him, or to do
 Execution or other Procefs; as upon a *Cap’ Utla-*
gat’, or upon Contempt: But he ought first to sig-
 nifie the Cause of his Coming, and request the
 Owner to open the Door, but not to break open
 any Man’s House by Night.

Fourthly,

Fourthly, Upon a *Fieri fac'*, or *Extendi fac'*, the Sheriff may not enter into the House of any, ^{Fl. fa' &c.} the Door being shut, nor draw a Latch, no not after Request and Denial; yet tho' the Sheriff be a Trespasser in breaking open the House by *Fieri fac'*, the Execution is good.

Fifthly, The House of any one is not privileged but for himself and his Family, and his own proper Goods, not to protect any who flee there, or the Goods of another conveyed there; and in such Case after Request, the Sheriff may break open the Door; but in the principal Case he did not request it, and so the Shutting the Door by the Defendant was lawful, and no Action lies against him. And as for the Allegation of [*præmissorum non ignarus*] it is too general, and Notice ought to be specially alledged that he was Sheriff, and what he came to do; and the Defendant being a Stranger to the Execution, he is not bound to take Notice of the Sheriff's Intent.

See the Case of *Waterhouse & Ux' vers' Salt-marsh. Hob. 263, 264. Dalt. Sh. 528.* where the Sheriff, &c. under Colour of a *Latitat* and an Outlawry, made a violent Entry with drawn Swords, &c. where the outward Door was open and no Opposition made, broke open the Chamber Door, arrested the Defendant, took Appearance upon the *Latitat*, and 4 s. for suing out a *Supersedeas* upon the Outlawry, and so discharged him: And the Sheriff was fined 200 l. for the unnecessary Terror and Outrage, and for not signifying that he was Sheriff, that the Door might have been open'd without Violence, but especially for discharging the Plaintiff upon the *Cap' Utlagat'*.

Upon a *Fieri fac'*, a Barn which stands in the Field may be broken by the Sheriff, because it is not Part of the Dwelling-House, and there needs

no Request; *aliter* had the Barn been adjoining, and Parcel of the House. *Siderfin* 186, 187. *Penton's Case*. 1 *Bulst.* 146. *Foster and Hole*.

Where on *Fi. fa.* he may break Doors and Locks But tho' a Sheriff cannot break open a House, being to take Execution by *Fieri fac'*; yet when the Door is open that he enters, then he may and ought to break open the Door of an Entry or Chamber which is locked, or break open any Chest which is locked and take the Goods, and if he do not, an Action on the Case lies against him. 1 *Brownl. Rep.* 50.

When Execution is lawfully begun. Diversity was taken in *White* and *Wiltshire's Case*, where the Execution is lawfully begun, there the Sheriff or his Officers may break the House to make Execution; otherwise, when it is not lawfully begun. If one be arrested by the Sheriff, and he escapeth to his own House, and the Sheriff pursues him and breaks open the Doors of his House, and takes him again, the Party shall never take Benefit of this his own wrongful Escape.

Bailiffs shut up. Two of the Under-Sheriff's Bailiffs entred into the House, the Door being open, to make Execution of the Goods, and the Plaintiff shuts the Door upon the Bailiffs, and imprisoned them for two Hours; the Sheriff may break open the House to rescue his Bailiffs. *Cro. Jac.* 555. *White* and *Wiltshire*.

Private Process. Note, The Sheriff was fined for breaking open an House, and rushing in with Sword drawn, the Door being half open, on private Process. By the *Stat. W. 2. cap. 15.* the Sheriff may break open an House or Castle to make Replevin when the Goods of another are conveyed there. 5 *Rep. Semain's Case*.

Bankrupt's Goods. If a Bankrupt convey his Goods to his Neighbour's House, the Commissioner's Serjeant may not, but the Sheriff may break open the House, because he

he is a sworn Officer of the King's. *Goodwin's Law against Bankrupts 65.*

Upon a Commission of Rebellion out of Chancery, the Sheriff may break open the House to apprehend the Party therein, whether in his own or another's House. *Crompt. fo. 47.* Commis-
sion of
Rebel-
lion.

The Sheriff may take the *Posse Comitatus* to do *Posse Co-* Execution, *per Statut. W. 2. cap. 39.* and he may take it *post vel ante querimoniam*, but he must take it after Resistance, and not before; for *sequi debet potentia justitiam non precedere.* *Co. 2 Inst. pag. 445.* *mitatus.*

But suppose the Sheriff cannot do Execution by the *Posse Comitatus*, then saith the Book, *1 Keb. 99, 117.* he ought to acquaint the Deputy-Lieutenants of the County, and if they assist not, he must acquaint the King and Council, and yet the Sheriff shall not be amerced, if he return he cannot do Execution; but in *Godbolt 79.* upon a Resistance of Execution, the Council-Table refused to meddle in it, because the Court of King's Bench ought to see their own Judgment executed: And a Writ was prayed to the High-Sheriff with a special Rule, that the High-Sheriff should execute it himself, which the Court granted, and a Tipstaff to fetch the Under-Sheriff up to return his Writ, which is better than an Attachment which is returnable by it self. *1 Keb. 99, 117. Godbolt 79. Bush and Chamberlaine. Vide Golsb. Rep. 79. Dalt. 528.* Special
Writ to
the High-
Sheriff.

And it seems the Sheriff is bound to do and make Executions at his Peril, and to that End may take the *Posse Comitatus*.

To what Sheriff, of what Place or County shall Execution be awarded.

To what Sheriff.

If Recognizance of Bail be taken by a Judge of the Common Pleas at *Serjeants Inn* in London, upon an Original brought in London, and he certifies this into the Court of Common Pleas, and it is there enrolled, but it appears on Record, that it was taken as before; a *Scire fac'* may be awarded upon this Recognizance to the Sheriff of London where the *Capias* was, for there was the Commencement of it, and also the *Scire fac'* may be awarded to the Sheriff of *Middlesex* where the Recognizance was enrolled. 1 *Roll. Abridg.* 891. *Johns and Lee, Andrews and Harbin, Poltney and Forebench, Feildgate and Gardener, contra Mariae by Brook*, and by all the Prothonotaries then, it ought to be brought in London and not in *Middlesex*. But in 13 *Car. 1.* the Prothonotaries certified that it may be brought in London or *Middlesex*.

Serjeant at Mace may execute *Elegit*.

W. 2. c. 18. saith *Vic. ei liberet Medietat' per rationabile Extent.* (viz.) *per inquisition'*, and the Sheriff is sworn, and a Serjeant at Mace is not sworn to take a Jury; yet the Statute extends to every other immediate Officer, to any of the King's Courts of Record, and so a Serjeant may execute this, and a *Fieri fac'* also, and this Statute couples *Elegit* with a *Fieri fac'*, and limits both to be executed by the Sheriff, or his Officer, but in Waste and Redisseisin, the Sheriff must do it in Person. 4 *Rep.* 65, 66. *Fullwood's Case.*

The Writ to levy Damages in Waste to whom to be directed.

If a Man recover Damages in Action of Waste in one County, the Writ to levy them shall issue to the Sheriff of the same County where the Action was first brought, and not to any other; but if the Sheriff return he had nothing, he shall have Execu-

Execution by *Testatum*, into any other County where the Recoverer will. 29 Ed. 3. 9. b.

Having treated of Executions in General, as far as relates to Sheriffs; I shall now proceed to speak of Executions in particular, as to the Sheriff's Demeanor about the executing of them, and making due Returns upon them. And 'tis a Point very fit for the Consideration of all Sheriffs.

There properly are but four Manners of Executions depending on Judgments upon Suits or Actions. Two by the Common Law, and two by the Statute Law.

By Common Law,	{ <i>Levari & Fi' Fac'</i> }	To which may be added,	{ <i>Stat. Staple, Stat. Merchant, Recognizance.</i> }
By Statute Law.	{ <i>Capias Elegit.</i> }		

Alias 7.

Of Executions.

Note, By *Dalt* of Sheriffs, cap. 24. Executions are said to be of divers Sorts, and in divers Manners to be executed, and he enumerates these Seven, viz.

1. *Statute-Merchant*,
 2. *Statute-Staple*.
 3. *Recognizance*.
 4. *Elegit*.
- } Of the Body, Lands and Goods.
- } Of the Moiety of Lands, and all the Goods, and sometimes of the Body, Lands and Goods.
- } Of the Moiety of the Lands, and of all the Goods of the Debtor.

5. *Ca-*

- | | |
|-------------------------------------|---|
| 5. <i>Capias ad Satisfaciendum,</i> | } Of the Body only.
Of the Goods and Chattels, <i>i. e.</i> Terms for Years, &c.
Of the Profits of the Lands, and of the Goods. |
| 6. <i>Fieri Facias,</i> | |
| 7. <i>Levari Facias,</i> | |

Executi-
on defi-
ned.

Note, that an Execution in our Law signifieth the last Performance of an Act, as of a Judgment, Statute, or the like.

Also of
2 Sorts.

And that these Executions are also of two Sorts.

1. *One Final.*

2. *Another Quousque.*

1. *Final.* 1. An Execution *Final*, is when the Defendant's Lands are extended, or his Goods sold, and delivered to the Plaintiff, who accepting this in Satisfaction, ends the Suit.

2. *Only Quousque.* 2. That an Execution with a *Quousque*, and not *Final*, is in the Case of a *Capias ad Satisfaciendum*, where the Body is taken to the Intent to satisfy the Plaintiff; yet is no Satisfaction, but a Pledge for the Debt; neither is the Party's Imprisonment absolute, but until he doth satisfy, or agree with the Plaintiff.

Concerning Escapes out of Execution, &c. by Consent, or without; see after. Chap. 21. Tit. *Escapes.*

Of these Executions I shall treat distinctly, limiting my self therein to the Duty and Behaviour of She-

Sheriffs. And first of the *Capias*, against the Body only.

Note, Execution may be on Affirmance of Con-
 victions, &c. either by *Levari Fac'*, *Fieri Fac'*, or Ele-
Ca. Sa. See *Salk.* 369. 379. *Nota.*
on of Ex-
ecutions.

Of a *Ca. Sa.* &c.

Capias ad Satisfaciend', is a judicial Writ, and
 lies where a Man hath recovered in a Personal Acti-
 on any Debt or Damages in the King's Court, di-
 rected to the Sheriff to command him to take the
 Body of the Person condemned in Debt, and to put
 him in Prison till Satisfaction made. *Dalt.* 138. *Ca. Sa.*

It lies not against an Earl, Duke or Baron, or
 their Wives, except in some special Cases, nor a-
 gainst an Heir or Executor, except in false Pleading.
Vide Dalt. 143. 3 Co. 11. *Dyer* 208. Where it
lies not.

It lies against such Persons against whom a *Capias* Where it
 doth lie in the Commencement of a Suit, as Debt, lies.
 Account, Action on the Case, Trespas *Vz. & Ar-*
mis, Annuity and Covenant; but it lies not for a
 Recovery of Damages in a real Action.

If one be in Execution by *Ca. Sa.* which is re- Where
 turned, no other Execution can be sued against no other
 him, his Lands and Goods. *Vide Stat.* 21 *Jac.* 24. Executi-
on.
 but it is otherwise after his Death.

A *Capias* is to have the Body of such an one Presently
 such a Day, and the Sheriff brings the Body or in Execu-
 returns the Writ before the Day, it is good. *Winch.* tion.
p. 7.

If one be delivered in Execution by the King's
 Writ, he is presently in Execution and in Custody
 without laying Hands on him to arrest him, by
Coke C. 7.

The Sheriff is to be excused for taking one by Sheriff
 a false Name in Execution; and if the Judges ad- takes one
 mit this false Name, yet the judicial Writ ought not by a false
 to Name.

238 The Office and Duty of Sheriffs, &c.

to be examined by the Sheriff. *Lane Rep.* 49, 52. *Doily and Jolliff.*

May not be discharged. One in Execution may not be discharged by *Habeas Corpus* or Writ of *Privilege*; and if one taken on Contempt be taken in Execution, he shall not be set at large. *Siderfin* 289. *Swallow's Case.* *Id.* p. 90.

Execution against one attaint of Felony and in Custody if he please; and if the Felony be pardoned, or the Attainder reversed, he shall be in Execution. *Mo.* 178, 274. *Mich.* 10 *Car.* 1 *B. R.* *Chappel's Case.*

Ca. sa. after a *Fi. fa.* If a Man recovered Debt against *B.* and levy Part of the Debt by *Fieri fac'*, which is returned; yet he may take the Body of *B.* by a *Cap' ad Satisfac'* for the Residue. 4 *Jac.* *B. R.* *Carter and Copping.*

Tho' at the King's Suit. Tho' the King's Debtor be in Execution by his Body or his Land, yet the Subject may take him in Execution by his Body; for the Statute of 15 *Ed.* 3. 13. is to be intended of Executions of Lands and Goods, and not of the Body, which is *tout a tout.* *Hobart* 160. *Shirley's Case.*

Escape. Of Escape of one in Execution by *Ca. Sa.* *Vide Tit. Escape.*

Sheriffs of *Bristol* took the Plaintiff by a *Cap' ad Satisfac'*, and detained him in Prison until the Party Defendant, and now Plaintiff, paid the Money to the Sheriff. *Per' Cur'*, This was contrary to his Warrant, which is, *Ita quod habeat denarios in Curia*; and because he did not so, he is chargeable to him that was in Execution. *Hetley* 122. *Read and Earlsfield.*

Return Album breve. A *Capias ad satisfac'* was returnable *Quinden' Mart'* and that Writ was returned *Album breve*, and a *Testatum* thereupon, and the Defendant taken by it. The *Testatum* issued out accordingly, be-

because the *Capias* was not returned. And the Court granted a *Supersedeas*. 1 *Brownl.* 40. *Rey-Supersed.* *ner* and *Mortimer*.

Debt on Judgment in B. R. the Defendant confesseth the Judgment, and Execution above a Year; and not being able to find the Plaintiff, he paid the Money to the Marshal. Plaintiff replies, he did not absent voluntarily; and the Defendant demurs. *Judgment pro Querente*. The Sheriff cannot receive the Money as on *Fieri fac'*, nor is the Party remediless, for he may pay his Money into Court. 1 *Leon.* 140. and have an *Audita Querela*; but the Plaintiff were remediless should the Gaoler be Insolvent. *Dom' Rex* and *Javan*. He on Indictment and Conviction of a disorderly House, was committed to the Marshal for Payment of a Fine, but before actual Imprisonment the Fine was paid to the Marshal; yet resolved, this is no good Payment, and the Party was forced to pay it over again. *Per Jones*, It is doubtful whether voluntary Payment to the Sheriff on *Fieri fac'*, before Execution of his Goods be pleadable in Discharge (but that is adjudged it is so), much less on a *Cap'* which is *ad satisfaciend'* the Party in Court, and he is committed *quousque satisfaciat Parti*, not the Sheriff. 3 *Keb*, 788. *Taylor* and *Baker*.

Verdict,

If the Issue be, Whether the Sheriff took *J. S.* and kept him in Prison under his Custody in Execution by Force of a *Capias ad satisfaciend'*; and the Jury found he took him by Force of an *Alias Cap' ad satisfaciend'*; although it is not found he kept him in Execution for the Debt and Damages aforesaid, according to the Issue; yet this is a good Special Verdict. For it shall be intended; for the Intend-
Con-ment.

The Office and Duty of Sheriffs, &c.

Consequence is necessary of that which is found, because he cannot take him, but he ought to be in Execution. *Hobart, Foster and Jackson's Case.*

Vide 3 Rep 67. Westby's Case. 5 Rep. Blomfield, Garner, Frost and Drury's Case.

How Execution upon a *Ca. sa.* shall be sued-upon a Judgment against two or more, and though there shall be but one Satisfaction, yet the Sheriff may take the Bodies of all in Execution. *Vid. 5 Rep. 86. Blomfield's Case, and 11 Rep. Godfrey's Case.*

And *Note*, on a *Ca. sa.* The Sheriff shall have his Fees for the whole Debt. *Salk. 331.* But on *Elegits & Fi. fac's.* for so much only as he has levied.

*Capias
Utlagar'*

One taken on a *Capias Utlagar'* after Judgment after the Year, is in Execution at the Party's Suit, *sans Prayer. Salk 319. Quare Comberb. 373.*

On Con-
victions,
&c.

On Affirmance of Convictions, &c. Execution may be by *Levari fac'*, *Fieri fac'*, or *Ca. sa.* *Salk. 369. 379.*

CHAP.

C H A P. XVII.

What Goods, &c. and of whom shall be taken in Execution on Fieri facias, or not. After the Sheriff has seized, how he stands in the Eye of the Law, either to bring Actions for the tortious taking them away, or to make Satisfaction to the Party who recovered. Remedy against the Sheriff for the Money to the Value of the Goods taken in Execution, or not, and how to be pursued. The Sheriff's Office and Demeanor in executing a Fieri facias, and of the Venditioni exponas and the Return; what shall be a good Return on the Fieri fac', or not. Of Restitution to Lands or Goods seized by the Sheriff after Reversal of the Judgment, and after Sale of the Sheriff's selling a Term for Years taken in Execution, and when such Sale shall be good, or not. Whether a Scire facias shall go into Wales.

Of Fieri facias.

I Shall next treat of Execution by *Fieri fac'*; For what which is a judicial Writ, lying for him who it lies. hath recovered a Debt or Damage, directed to the Sheriff, commanding him to levy the same of the Defendant's Goods and Chattles. And it lies within a Year and Day; but after the Year there must be *Scire fac'*. *Dalt. 145.*

This Writ of *Fieri facias* is only against the Against Goods and Chattels of a Man; (*viz.*) Leases for Goods Years, Rents and Profits of Lands, Corn growing and Chattels only. or sown upon the Land, or moveable Goods; as Cattle, Corn in the Barn, Household Goods, Money, Plate, and Apparel. *Co. 1 Inst. 290. b. 3 Co. 12.*

R

What

What Goods, and of whom shall be taken in Execution by Fieri facias, or not.

- Goods pawned. Goods pawned shall not be taken in Execution for the Debt of him which pawned them, during the Time they are pawned. *Kitchin* 226.
- Not. The Sheriff upon a Writ of *Execution* may not
- Furnace annexed. seize and sell to the Party a Furnace annexed to the Freehold; for this would be Waste in the Lessee. 37 *Eliz. B. C. Day and Austin. Dalt.* 529.
- Not. The Goods Ecclesiastical of Clergymen are not
- Bona Ecclesiastica.* to be taken by the Sheriff, but by the Bishop, upon a *Levari fac'*, on a Recognizance. 2 *Inst.* 472.
- Not. If one sell any Goods to another depending an
- Goods sold pending the Action. Action against him, these Goods afterwards shall not be put in Execution; for they were lawfully bought, (if *bona fide*, and for valuable Consideration.) But if a *Fieri facias* be directed to make Execution of Goods, and after the *Teste* of the Writ, and before the Sheriff executè it, the Party sells his Goods *bona fide*, they may nevertheless be taken in Execution; (*aliter* now by the Statutes of *Frauds* and *Perjuries*). *Cro. El.* 174. *Mo.* 21. n. 72.
- Goods bound only from Delivery of the Writ. By Statute of *Frauds* and *Perjuries*, no Writ of Execution shall bind the Property of Goods, but from the Time of its Delivery to the Sheriff, Under-Sheriff, or Coroners; who upon Receipt thereof (without Fee) shall endorse on the Back thereof the Day of the Month and Year when they received it.
- Goods in the Hands of the Executor. If the Party dies after the Writ of *Execution* awarded, and before it be served, the Sheriff may serve it of the Goods in the Hands of the Executor. For by the Execution awarded the Goods are bound, and the Sheriff needs not take Notice of his

his Death. Cro. 1 Eliz. 181. Parker and Mosse.
1 Leon. 144, 145. Mesme Case.

After the Sheriff has seized the Goods, how he stands in the Eye of the Law. Either to bring Action for the tortious Taking them away, or to make Satisfaction to the Party who recovered.

The Sheriff may have *Trover* or *Trespass* at Election, against him that takes them away; as *Wilbraham* and *Snow's Case*.

The Plaintiff being Sheriff seizeth the Goods in Upon Seizure of Execution by Force of a *Fieri fac'*, and after (and before the Sale of them) the Defendant takes them Goods, and carries them away, and converts them to his Property is in the Sheriff's own Use; and the Plaintiff (being Sheriff) brings his Action of *Trover*; and adjudged the Action well lies. By the Seizure of the Goods in Execution the Sheriff hath a Property in them, so that he may re-seize them and sell them, as well when he is out of his Office as before. 2 Sand. 47. *Wilbraham* and *Snow*. Mod. Rep. 57. *Ayre* and *Aden*. 2 Sand. 234. *Mildmay* and *Smith*. Telu. contra fol. 44. *Vide antea*.

Therefore *Dyer* 99. cited in *Dalton* 147, is not *Nota*. Law, which saith, That by the Seizure of the Sheriff, the Property is not altered until they be sold.

After the Debt levied, the Sheriff is Debtor to When the Plaintiff, and capable of a Release from him, the Sheriff Action ceasing against the Defendant is *ipso facto* by becomes the Law transferred to the Sheriff, having both the Debtor to the Plaintiff Judgment to make it a Debt, and the Levy to make him answerable; and though Action of *Account* will properly lie in this Case, yet the same will many Times bear both Actions, though the Monies be received by *auter mains*, or the like. Hob. 206, 207. *Speak* and *Richards*.

The Case is reported by *Roll* thus:

Upon a
Levari
facias.

If a Sheriff levy Money upon a *Levari facias*, upon a Recognizance at the Suit of *J. S.* and returns the Writ served; *J. S.* may have Debt against the Sheriff's Executors. But in that Case the Plaintiff demurred to the Defendant's Plea, and concludes ill. 1 *Roll. Abr.* 418.

Action against the Sheriff, or his Executor, for levying Money on the *Levari*, and not returning the Writ.

The Plea was grounded upon a Release, and should have demanded Judgment if the Defendant should be admitted to plead a Release made after the Sheriff had made his Return; and in such Case Action lies against the Sheriff's Executor, although it does not appear that the *Fieri fac'* on the Judgment was returned; for this is not material, inasmuch as the Party is discharged by Payment of it without Return: And this is not grounded on a personal *Tort*, but on a Contract in Law; and this is not a simple Contract, but principally grounded upon a Record, as it was adjudged in *Parkinson* and *Culleyford's* Case.

Action by Executor, for levying the Debt, and not returning the Writ *in vita Testatoris*.

But in an *anonymous* Case. *Cro. Car.* 297. Action on the Case was brought by Executor against the Sheriff, who had levied the Debt in Execution, and did not return the Writ; and after the Testator died, and the Plaintiff for that *Tort*, *in vi-ta Testatoris*, and for the Loss which came to him, brought the Action. The *Quære* was, if it lies by the Executor, because it is a personal Wrong to the Testator: And the Court was divided. *Cro. Car.* 297. But the better Opinion is, that the Action lies against the Sheriff.

Vide Escape.

Where

Where and what Remedy against the Sheriff for the Money to the Value of the Goods taken in Execution, or not.

The Diversity lies on the Sheriff's Return. Return.

If the Sheriff in executing a *Fieri fac'* doth not misbehave himself, he shall not be charged in Debt or *Scire fac'*, unless it appear by his Return that he had the Monies in his Hands. As if the Sheriff return, *Cepi & seifiri feci in manus meas bona cattalla ad valentiam 160 l. quæ remanent in manibus meis ob defectum emptorum.* *Scire fac' sur Fieri fac'.*

On this Return the Sheriff shall not be charged in Debt or *Scire facias*, because it appears not that he has misbehaved himself. But if upon the *Fieri fac'* the Sheriff return, That he hath levied the Money, and doth not pay it to the Plaintiff at the Return of the Writ, the Plaintiff may have a *Scire fac'* against the Sheriff, to shew Cause wherefore the Money should not be levied of the Goods of the Sheriff. 2 Sand. 344, 345. Mildmay and Smith. Hutton 32, 11. Smith and Linsey. Where it lies, and where not.

So if in *Fieri fac'* to levy 200 l. Debt, &c. the Sheriff returns, That he had made a Warrant to his Bailiff, who had seized divers Goods of the said *S. ad valentiam* of 160 l. and that they were rescued out of their Custody, *ita quod* he could not levy the Debt, and that the said *S. nulla alia habuit bona.* The Plaintiff may bring a *Scire fac'* to have Execution against the Sheriff for the Monies, according to the Value returned, and the Sheriff shall pay it out of his own proper Goods. 1 Andersf. 247. Roke and Wilmot. 2 Sand. 341, &c. Mildmay and Smith. Vide antea.

Old Sheriff.

Scire fac' against the old Sheriff to pay the Money levied in Execution.

Motion to alter the Return.

Not amendable.

Pro defect' emptorum.

Ordered to pay.

Amendment of Return.

With this agrees. 9 Ed. 4. 50. *Scire fac'* 21. If the Sheriff return upon a *Scire fac'*, that he hath levied the Money and hath the same in Court, but hath not the Money at the Day, and then a new Sheriff is chosen; in this Case it being on Record, that the Money is levied by the old Sheriff, a *Scire fac'* shall issue against the old Sheriff to pay it. And if he cannot or will not discharge and pay the Money, the Party shall have a *Fieri fac'* or *Elegit* against the Sheriff, of his proper Goods.

On *Fieri fac'* the Sheriff seized several Goods which were mercery Ware, and returns *Fieri fac' ad valentiam* — which Return was filed. The Sheriff appears and prays to amend the Return, because some of the Goods were impaired by lying, and he could not get Buyers.

Per Cur'; 1. Such Return may not be altered, after it is returned and filed.

2. Where the Sheriff returns *Fieri fec' ad valentiam*, this shall be no Excuse of his Payment of the Money, because he might have returned he had seized the Goods, and that they remain *pro defectu emptorum*, and then he may be excused, if the *bona emptorum peritura* perish. *Siderfin* p. 40. *Needham* and *Ben-net*.

Therefore the Sheriffs were ordered to pay the Money, and to answer Interrogatives for their Contempt, having been ordered to bring in the Money, and not appearing till a Tipstaff was sent.

As to Amendment of Returns. Matter of Form in a Return is amendable, but not Matter of Fact, which goes to Justification of the Imprisonment. 2 *Bulst.* 259. *Dr. Alphouses's Case. Vide General Abridgement, Tit. Amendment.*

The Sheriff's Demeanor in executing the Fieri fac'.

If the Sheriff have a *Fieri fac'* against a Man's *Tresp. ver-*
 Goods, and before Execution he pay him the Mo-^{*sus vicount.*}
 ney, in this Case he cannot do Execution after,
 and if he do, an Action of Trespass or false Impri-
 sonment lies against him. *B. R. p. 12 Jac. 1.*

As to breaking open Houses to do this Execution,
vid. supra. See after.

The Sheriff upon a *Fieri fac'* cannot deliver the ^{Cannot}
 Defendant's Goods to the Plaintiff in Satisfaction deliver
 of his Debt, but must return the Execution in ^{Goods to}
 Court. *Cro. El. 504. Tomson and Clark. Noy 56. tiff.*
Mesme Case. Dalt. 529.

Action on the Case was brought against the ^{For not}
 Sheriff, for fraudulent Omission of Execution offeizing
 Goods that were in *Conspectu suo*; but he saith ^{Goods in}
 not in his Declaration, that he knew them to be ^{*Conspectu*}
 the Goods of the Defendant in that Action: And ^{*suo.*}
 for this Omission after Verdict, Judgment was ar-
 rested, by *Twisden and Windham. 1 Keb. 946.*
 The Gift of the Action is the Fraud, which can-
 not be without Notice, which is now wrapt in the
 Verdict, though it could not be pleaded, the She-
 riff being bound to take Notice whose Goods they
 are. *Russel and Comber.*

On *Fieri fac'* against *J. S.* who has the Goods Where
 of *A.* in his Possession, if the Sheriff sells these ^{Sheriff}
 Goods, Trover or Trespass will lie against him; ^{sells a}
 and to prevent this, all the Sheriffs of *England* take ^{Stranger's}
 Security. *Keb. 693. Sander's Case.* ^{Goods.}

Quære if the Sheriff may take Bond for his Se-^{How he}
 curity: But the safest Course is, for the Sheriff to ^{may en-}
 enquire by a Jury in whom the Property of the ^{quire of}
 Goods is, or else not to meddle with any such ^{the Pro-}
 Goods, which do not plainly appear to him to be ^{perty.}

the Defendant's, and it being found by the Jury, that excuseth the Sheriff.

Pleading by the Party, who has paid the Money to the Sheriff.

That he delivered such Goods to the Sheriff, &c. In *Detinue* the Plaintiff had Judgment, and brought *Scire fac'* to have Execution. Defendant pleads, That upon a *Distringas* to the Sheriff on that Judgment, he delivered such Goods to the Sheriff, and for the Residue that they were appraised at so much by Inquisition taken by the Sheriff, and that he delivered the Money to the Sheriff, but he doth not aver this Matter to be returned by the Sheriff; it is a good Plea, for otherwise the Defendant should be prejudiced, for he might have twenty several Executions served against him upon one Judgment; and he should be put to his Remedy against the Sheriff only, who may be Insolvent. And it is a less Mischief to enforce the Plaintiff, if his Plea be true, to take his Action for it against the Sheriff, and if it be not true, to take Issue thereupon. *Cro. Eliz.* 390. *Atkinson's Case.*

Where the Plaintiff shall have a new *Fieri fac'*, or not.

Now if the Sheriff levy Goods by Force of a *Fieri fac'*, and delivers them not to the Party, nor returns the Overplus, the Plaintiff may have a new *Fieri fac'*, because a Record shall not be avoided by a Matter in Fact: But by the taking the Goods of the Defendant to the Value of the Debt by the Sheriff, the Defendant is discharged, although the Sheriff do not satisfy the Plaintiff; therefore he shall not have a new Execution. *2 Roll. Rep.* 57. *P. Jac.* *1 Roll's Abr.* 902. *Q.*

New Execution for Surplus.

Where a Sheriff on a *Fieri fac'* returns, that he had seized Goods of lesser Value which were rescued, and that *nulla alia bona*, &c. the Plaintiff may not sue a new Execution, but only for the Surplus

Ch. 17. Of Executions. Vendition' expon'. 249

plus beyond the Value of the Goods rescued. 2

Sanders 344. Mildmay and Smith.

If the Sheriff levy Money in Execution, the May not Lord Keeper cannot order the Money shall stay in be stopp'd the Sheriff's Hands, or order that the Plaintiff shall in She- not call for it. Marsh, Rep. 54. riff's Hands.

If the Sheriff shall return *Fieri feci, sed non in-Venditioni veni emptores*, then a *Venditioni exponas* shall go *exponas* out.

Of the Sheriff's Selling Goods on *Fieri fac'*, and of the *Venditioni exponas*.

As to what Sale is good or not.

If the Defendant tenders the Debt, it is a Wrong Debt ten- for the Sheriff to sell the Goods. 1 Keb. 655. Le- dred. fan's Case.

If Goods remain in the Sheriff's Hands for De- Buyer re- fault of Buyers, and there perish, the Sheriff shall fused. not be chargeable. But if the Sheriff refuse a Buy- er, Action on the Case lies. 2 Keb. 464. Need- ham's Case.

The Sheriff took the Defendant's Goods in Ex- After sei- ecution by *Fieri fac'*, and before Sale the Record zing the was removed by a Writ of Error into the Exche- Goods, & quer-Chamber, and a *Superfedeas* awarded; and the before Sheriff returned upon the *Fieri fac'* Seizure of the Sale a *su- perfedeas*. Goods, and that they remained in his Hands *pro defectu emptorum*; and he also returned, that a *Superfedeas* was awarded, &c. and hereupon it was prayed for the Defendant, that he might have Re- stitution of his Goods. Crok. Eliz. 597.

But *per Curiam*, Altho' this Record be removed, *Sed non* and notwithstanding the *Superfedeas* awarded, in *allocatur*. Regard it came not to the Sheriff, till he had be- gun to make Execution, as appears by his Return, But a *Ven- ditioni exponas* shall be awarded to per- *ponas*.fect it.

And

Aliter if
Error be-
fore Sei-
sure.

And although the Plea-Roll be removed, yet it shall be awarded on the Return of the *Fieri fac'* which remains still in the Office. But as it is in 1 *Keb.* 324. *Brownwood* and *Estwel*, if the Error were allowed before Seizure, then tho' the Sheriff be unpunishable in that Case, yet *Superdeas* notwithstanding Execution done shall go, *quia im-provide, &c.*

Goods re-
stored in
Specie.

And *per Curiam* if the Goods be sold, the Mo-ney may be brought into Court to be restored to the Party; but if not, the Goods may in *Specie* be restored.

Superfede-
as before
Sale.

But if before Sale a *Superfedeas* comes to him, if the Sheriff after sells the Goods without a Writ of *Venditioni exponas*, this is void. *Pasch.* 8 *Car.* 1. *Scarling* and *King*.

Where
the Goods
are un-
der-fold.

The Sheriff sells Bricks for 7 *s.* *per Thousand* on the Place, for which he might have 16 *s.* *per Thou-sand.* The Question was, Who should pay the Overplus, the Buyer or the Sheriff's Executors. And *per Curiam*, The Sheriff's Executors shall pay the Overplus, the Sale being absolute, and not an Agreement to sell. 3 *Keb.* 285. *Cutten* and *Hunt*.

Or prised
at Under-
value.

The Sheriff perswaded the Jury to prize the Goods at Undervalue, and so sold them. This is an Oppression enquirable at the Affizes by Indictment. *Cro. Jac.* 526. *Sayer's Case.* and *Cro. Jac.* 514, 515. *Sly versus Finch.* *Dalt.* 530.

Where
the old
Sheriff
after
a Writ
of Dis-
charge
may sell.

If the Sheriff upon a *Fieri fac'* against *J. S.* seize certain Wood whereof *J. S.* was possessed, and the Sheriff pay Parcel of the Money received, and does not return his Writ, and after the Sheriff is removed and another Sheriff chosen, and after the Writ of Discharge delivered to him, he sells the Wood; this is a lawful Sale, because by the Seifure although the Writ is not returned, he is chargeable to the Party. *Trin.* 3 *Jac.* *B. R.* *Cro. Jac.* 73. *Ayer* and *Aderley*. And there a *Distringas* issued to

to the new Sheriff to distrain the ancient Sheriff to expose to Sale, which does not give to him Authority to sell, but compels him to do that which he might do by Law. But if upon a *Fieri fac'*, the Sheriff returns that he had seised the Goods, but *non invenit emptores*, and after he is removed, and a new Sheriff made, the old Sheriff may not sell them after, though a *Distringas* come to him, and if he sell them the Sale is not good, for the new Sheriff must sell them. *Pasch. 32 Eliz. Dodd and Conney. 2 Latch. 117. Dixson's Case.*

But not upon non invenit emptores.

A *Venditioni exponas* may not be awarded, if it appear that the Goods are out of the Hands of the Sheriff. *2 Sand. 344. Mildmay's Case.*

Where no *Venditioni exponas.*

The Sheriff (if he think fit) may sell Goods without a *venditioni exponas*, and the Sale shall be good. *Cro. Jac. 73. Dalt. 529.*

What shall be a good Return of the Sheriff on a Fieri fac', or not.

Note, If the Sheriff do make Execution on *Fieri fac'*, though he never return the *Fieri fac'*, yet the Execution is good. *Aliter in Elegit. Vide infra.* And if the Sheriff levy the Money and give it the Plaintiff, though he never make any Return to the Court, it is good enough. *4 Rep. 64. Fullwood's Case, and p. 90. Hoe's Case.*

Where there needs no Return on *Fieri fac'.*

The Bailiff of the *Savoy* levied Goods, and yet returns *nulla bona* on Attachment; and for Cause saith, That one *V.* at the Time of the Execution shewed a Bill of Sale on good Consideration, where by if he executed, he was liable to an Action: And therefore, without Security to save him harmless, he refused to make any other Return; which the Court agreed, and ordered the Money to be brought into Court; and as the Trial goes between

Nulla bona returned, because the Party refused to give Security to the Sheriff.

tween the Sheriff and *V.* the Return to be amended or not. 1 *Keb.* 901.

Nil habet.

Upon a *Fieri facias*, the Sheriff returneth *quod nihil habet*, this is not good without saying further, *nec habuit post receptionem brevis.* 39 *H. 6.* *Fitz. Ret.* 30.

Ret' quod Clericus est beneficiatus per vic London.

On Recovery of Debt on *Fieri fac'* directed to the Sheriff of *London*, he returned *quod Clericus est beneficiatus in Ely.* The Court conceived this Return improper, in Regard there should have been a Suggestion on the Roll, after the Return made by the Sheriff of *London*, that the Defendant had Goods in *Ely*, and that the Sheriff of that County should have made this Return of *Clericus beneficiatus*. Now if the Sheriff of *London* return *nulla bona*, but that he is *Clericus beneficiatus* in *Fi fa' E-Ely*, thereupon went a *Fieri fac'* to the Bishop of *pisc' Ely* on a *Testatum*, and he returned that he had *nulla bona Ecclesiastica*; this Return by some is not good, but he ought to return a Sequestration, having admitted him to be *Clericus beneficiatus*; but he is not estopped to say, that he is not *Clericus beneficiatus* by the Return of the Sheriff. The Court agreed the *Fieri fac'* well directed to the Bishop and not to the Sheriff, but they conceived it a good Return, and if it be false, the Plaintiff may have his Action on the Case. 1 *Keb.* 497. 2 *Keb.* 83. *Picard* and *Payton*. See after.

Clericus beneficiatus to a Statute.

On a Statute, if the Sheriff return *quod est Clericus beneficiatus nullum habens Laicum feod' nec bona nec Catalla*, but that he is *beneficiatus* in such a Diocese, then a Writ of Sequestration shall go to the Bishop to sequester the Profits, and to deliver them to the Conusee until he be satisfied. 2 *Roll. Abr.* 474. *Pope* and *Bautree*.

If there be false Return on a *Fieri fac'*, the Remedy is by Action on the Case. In a *Fieri fac'* to the Sheriffs of London, they return *nulla bona*, but that he is *Clericus beneficiatus* in Ely; upon which a Writ issues to the Bishop of Ely, and he returns *nulla bona Ecclesiastica*: If it be so that he hath a Spiritual Living, the Plaintiff may have Action on the Case against the Bishop. *Siderfin* pag. 276.

The Party may aver the Value of the Goods greater than the Return, but the Sheriff is stop'd. 2 *Keb.* 789, 821.

Return of a *Fieri facias*. Sur venditioni expon'.

Virtute istius brevis *Fieri feci de bonis & catallis, terris & tenementis infranominat' R. B. ad valentiam 200 l. & illa de die in diem venditioni exposui & inde vendidi ad valentiam 100 l. Quas quidem centum libras ad diem & locum infranominat' J. W. prout interius mihi præcipitur, & resid' bonorum & catallorum prædict' adhuc penes me remanent invendit' ob defect' emptorum.*

Virtute istius brevis cepi bona & catalla A. W. *infra-*script' ad valentiam omnium denariorum *infra-*script'. Et illa venditioni exposui ad quod nondum inveni emptores. Et ideo denarios *infra-*specificat' habere non possum ad diem & locum *infra-*content' prout mihi præcipitur.

Other Forms of Returns, vide *Dalton*, cap. 61. and new *Ret. Brev.* from 252 to 269.

Restitu-
tion.

Of Restitution to Lands or Goods seised by the Sheriff, after Reversal of the Judgment, in what Cases it shall be, and in what not.

Upon
Sale of a
Term on-
ly to the
Money.

If a Man recover Damages, and had Execution by *Fieri fac'*, and upon a *Fieri fac'* the Sheriff sells the Term for Years to a Stranger, and after the Judgment is reversed, he shall only be restored to the Money for which the Term was sold, which was by Default of the Party, and not of the Term it self, because the Sheriff had sold this by Command of the Writ of *Fieri fac'*. *Dyer 363. 8 Rep. 143. Dr. Drury's Case, 19. b. Matthew Manning's Case. 5 Rep. 90. b. Hoe's Case.*

Upon Re-
versal of
Outlawry

So if the Goods of a Man outlawed be sold by the Sheriff upon a *Capias Utlagatum*, and after the Outlawry is reversed by Writ of *Error*, he shall be restored to the Goods themselves; because the Sheriff was not compellable to sell these Goods, but only to keep them for the Use of the King. *5 Rep. 90. Hoe's Case.*

Only to
the Value.

But upon *Fieri fac'* he shall have Restitution only to the Value:

1. Else none would buy.

Must le-
vy the
Debt.

2. By *Fieri fac'* the Sheriff is compellable to levy the Debt upon the Goods: One is *compulsio*, the other *voluntas*. *8 Rep. 143. Doctor Drury's Case.*

Elegit up-
on Dama-
ges.

If a Man recover Damages (as suppose in a Writ of *Covenant*) against *B.* and had *Elegit* of his Chattels, and of the Moiety of his Lands; and the Sheriff upon this Writ delivers a Lease for Years of Land which *B.* had, to the Value of 50 *l.* Part of the Sum recovered, and after *B.* reverseth the Judgment; he shall be restored to the Term it self, and not to the Value. For tho' the

the Sheriff might have sold the Term upon this Writ; yet here is not any Vendition to a Stranger, but a Delivery of a Term to the Party who recovers, by Way of Extent without any Sale, and therefore the Owner shall be restored: For the Sheriff is not bound by this Writ to sell the Term, as he is in a *Fieri fac'*. *Pasch. 16 Car. B. R. Buckhurst and Mayo.*

Quære, For this is a Sale; all the Term being delivered to the Party according to the Value in Gross, and not Annual. *1 Rol. Abr. 778.*

So if Personal Goods were delivered to the Party *per rationabile pretium & extantum*, upon Reversal of the Judgment he shall be restored to the Goods themselves for the same Reason.

Lessee for 99 Years, by his Will devised his Lease in these Words; (*viz.*) *I devise my Lease to my Wife during her Life, and after her Death, I will that it go to her Children unpreferred; and made his Wife Executrix and died. The Wife entred and married with J. S. and afterwards for 140 l. Debt recovered against J. S. on a Fieri fac' the Term was sold by the Sheriff, and afterwards the Judgment was reversed by Writ of Error, and awarded, quod omnia qua amisit ratione judicii restituantur.* The Wife (the Executrix) died. And *per Curiam*, these Points were resolved:

1. The Executory Devise of the Lease after the Death of his Wife to the Daughter (unpreferred) was good.

2. That the Sale made by the Sheriff upon the *Not Scire fac'*, did not destroy the Executory Devise.

3. That Sale made of the Term by the Sheriff stood good, although the Judgment was reversed; and the Plaintiff (the Daughter) shall be restored to the Value of the Term, but not to the Term it self; and yet the Vendee had an absolute

lute Property in the Term during the Life of the Wife. Mich. 27 Eliz. B. R. *Amner* and *Ludington*, 8 Rep. 96. *Manning's Case*.

Restituti-
on and an
Inquiry of
Profits
receiv'd.

A Judgment in *D.* being reversed in B. R. a Writ of *Restitution* was awarded, and to enquire what were the Profits of the Land recovered *a tempore judicii*; (*videlicet*) 7 Aug. 19 Jac. And the Inquisition returned, That they amounted to 10*l.* *Per Cur'*, The Writ is ill; for it ought not to have been what the Profits of the Land amounted unto from the Judgment. For the Plaintiff is not to answer the Profits longer than from the Time of the Execution sued. Then there was a new Writ of *Restitution*, which was, What Profits of the Land the Plaintiff (who recovered) had taken *colore judicii prædicti*, which was 7 August. 19 Jac. and after the Reversal thereof. Cro. Jac. 698. *Sympson* and *Juxon*.

Form of the Return upon a Writ of Execution:

Nihil ha-
bent.

* *Q.*

J. *G. & alii infranominat' nihil habent nec eorum aliquis * nihil habet in balliva mea, unde restitutio bonorum & catall' infra-script' infranominat' W. M. habere facere potui: Necnon 24 l. infra-script' eidem W. M. fieri facere potui prout, &c.*

Virtute istius brevis mihi direct' (tali die & anno infra-script') tenement' infra-script' cum pertin' resei-firi & infranominat' T. & H. plenam possession' & seisinam inde restitui prout interius mihi præcipi-tur. Vide Dalt. 277. New Ret. Br. 382.

Of the Sheriffs selling a Term for Years taken in Execution, and when such Sale shall be good, and when not.

For the Understanding how the Law is in this Point, you must observe a Diversity between the Sale of a Term on a *Fieri fac'*, and Extent on an *Elegit*; for the *Elegit* is, *Quod per Sacramentum 12 proborum, &c. per rationabile pretium & extentum*, That they appraise the Goods and Chattels of the Debtor, and extend his Lands; and therefore if they are not appraised by the Jurors, he cannot sell them, (as *Dyer fol. 100.* and so is *5 Rep. Palmer's Case*.) Execution by *Elegit* ought to be *per Inquisitionem per Stat. W. 2. c. 18.* which saith, (*per rationabile pretium*) which extends to Chattels, and *per extentum*, which refers to Lands. In *Elegit* the Goods are to be delivered to the Party *per rationabile pretium*; but in *Fieri fac'* the Sheriff must sell the Goods. *1 Keb. 566. Glaswell and Morgan.*

In *Elegit* the Term may not be extended without shewing the Certainty of the Commencement; for after the Debt satisfied, the Party is to have his Term and Remainder. But upon *Fieri fac'* the Sheriff may sell, and his Return is General, *qd' fieri feci de bonis & catallis. 5 Rep. Palmer's Case.*

Now the Sheriff is to be careful in the Sale of a Term on *Elegit*, if he make particular Recital that there be no Mistake. But a general Recital is better: As,

In *Ejectment* it was found by Special Verdict, that the Sheriff upon an *Elegit* impanelled a Jury, who found that the Defendant was possessed of a Lease for 100 Years, which began at *Mich. 2 & 3 of Ph. & M. ubi revera*, as it was found it begun *Mi.h. 3 & 4 of Ph. & M. cujus quidem*

Verdict,
That In-
quest on
Elegit
found one
Thing,
and She-
riff sold
another.

H. *statum interesse & terminum in tenementis prædictis prædicti Juratores appretiarunt ad 80 l.* and the Sheriff sold it to the Lessor of the Plaintiff, for 80 l. *Dalt.* 532.

Sale void. Now the Inquest found one Thing, and he sells another, (as this Case was) and the Sale not being warranted by the Inquest is void. But had the Inquest found he had been possessed of such Land generally for the Term of divers Years to come, and they had appraised it for so much, without shewing the certain Beginning or Determination, it had been well enough; for they shall not be compelled to find a Certainty, not having Means to be informed thereof; or if the Sheriff sells all such Interest which the Defendant had in the same Term, the Sale had been good, *5 Rep. Palmer's Case.*

Sale on Fieri fac' and Inquest mistook the Date. So is Sir G. Siddenham's Case in B. R. The Inquest on a *Fieri fac'* found that the Defendant was possessed of such a Term, and mistook the Date, and the Sheriff sold it; the Sale was not good. **New Fieri fac'.** And on the new *Fieri fac'* the Court directed that it should be found, that he was possessed of a Lease for Years generally, and yet continuing, and that he sold it. *Cro. El.* 584. *Palmer's Case.* 4 *Rep.* 74. *mesme Case.*

Baron and Feme.

W. and his Wife possessed of a Term in Right of the Wife, as administratrix to *C. W.* being indebted, granted it to *B.* to the Use of *W.* and his Wife for their Lives, and afterwards to the Use of *B.* himself. *W.* is sued for this Debt, and Recovery against him, and a *Fieri facia* being awarded to the Sheriff, he for this Debt of *W.* sold the Term to the Plaintiff. *Per Cur'.* This Grant of the Term to the Use of the Grantor himself is not void *per Stat.* 1 *H.* 7. for this Grant is not to avoid Creditor: For the Term is in Right of

What Term not extendible.

of the Wife as Administratrix, and if it had so continued in the Hands of *W.* and had never been granted, this was not extendible for the Debt of *W.* and if *W.* had it as Executor himself, it was not extendible for his proper Debt, and Fraud shall not be intended except expressly found; therefore the Sale is good. *Cro. El.* 291. *Ridler* and *Punter*. Fraud not to be intended.

W. had Execution out of the King's Bench by Officer *Fieri facias*, of a Term, which was sold by the first sells Bailiff of a Liberty. After, upon another Judgment the Bailiff delivers this Term to another, Judg- on one ment pretending that the first Judgment and Execution was fraudulent. But *per Cur'* it is not well done; vers itup- for he is not a Judge of Fraud, and the Court will on ano- not allow such Pretence to Sheriffs and Officers. ther. *Latch. p. 53. Warrington's Case.*

If the Sheriff extend or sell a Lease, this Sale shall bind the King (as to his Debt), because it is Where Sale shall but a Chattel, and there was no Covin. 8 *Rep.* bind the 171. *Sir Gerrard Fleetwood.* King,

Upon an Execution against the Husband for his May sell Debt, the Sheriff may sell the Wife's Term du- the ring her Life. *Co. Lit.* 351. *a.* Wife's

The Form of a Return of *Fieri feci* on a *Fieri* Term for *facias*, vide *Dalt. c. 16. New Ret. Brev. 252. &c.* of the the Debt *Baron.*

Whether a Fieri fac', &c. upon a Judgment in the King's Bench shall go into Wales.

Plaintiff recovers a Debt against the Testator in *Wales*. *B. R.* the Action was laid in *London*; and after the Death of the Testator, the Plaintiff after Judgment in *Scire fac'* sues a *Fieri fac'* at *London*, upon which the Sheriff returns *nulla bona*, by which he sues a *Testatum Fieri fac'* to the Sheriff of *Montgomery* in *Wales*, directed to levy the Monies re-
S 2 cover-

The Office and Duty of Sheriffs, &c.

covered *de bonis Testatoris in manibus Executoris*.
Upon which Writ the Sheriff returns thus:

EGO C. L. Baronet, Vic. inframentionat,
Comit' Montgomery Dom' Regi humillime
Certifico quod infraspacificat' Comitatus Montgome-
ry est un' duodecim Comitatus infra Principalitatem si-
ve Dominium dicti Dom' Regis Wallie ubi Breve
Domini Regis ipsum regem minime tangen' non cur-
rit, quodque non patet per istud breve quod idem bre-
ve dictum Dom' regem ullo modo tangat, unde ad-
visament' Curie dicti Dom' Regis coram ipso Rege
humillime imploro si mandatum istius brevis exequi
poterim.

C. L. Baronet, Vic.

Sheriff
not to
dispute
the Ju-
risdiction
of the
Court.

The Par-
ty may
shew it.

Elegit,
&c. lies
into
Wales.

So does a
Fieri fac.

The Sheriff on this Return was amerced, and held that the Plaintiff should have a new Writ. For the Sheriff by his Return ought not to dispute the Jurisdiction of the Court, to which he is a Minister: But if the Court erroneously award Process which was not to be awarded, the Sheriff ought to obey and execute it; but the Party grieved may shew this Matter to the Court, and pray that they will supersede their erroneous Process, and so have Remedy. *Dalt.* 529.

But as to the Question, *vid.* 2 *Sand.* 194. *Draper* and *Blaney*, 2 *Keb.* 657. *Draper's Case.* 715.

Elegit lies into *Wales*, and so doth Execution on a Statute-Merchant, and that *breve Dom. Regis non currit in Walliam*, is intended of Originals, not on Judicials. 3 *Keb.* 170. *Witrong* and *Blaney.* 1 *Bulstr.* 54. *Hall* and *Rotheram.* *Cro. Jac.* 484.

A *Capias* on a *Fieri fac'* lieth into *Wales.* 2 *Keb.* 715.

It was the Opinion formerly, That a *Fieri fac'* on original Judgment in *B. R.* doth not lie into *Chester*,

Chester, Wales, &c. but as *Dyer*, the Court shall send the Record and Writ thither. And in Action of Debt there it may be; but it is granted every Day in *Lancaster, Wales, &c.* 2 *Keb.* 410. *The King versus Needham and Bennet.*

A Writ of *Execution* goes into *Wales*, and 27 *Wales and H. 8. c. 26.* makes this plain; for by it *Wales* and *England* are annexed. *Plowd. fo. 200. Stradling England.* and *Morgan.*

So does an Extent, or *Capias Utlagat. Godb. 214.*

So do Certioraries for Riots, &c. 2 *Cro. Sir J. Carew's Case. 2 Roll. Rep. 28. 1 Cro. Car. 331. 1 Vent. 146.*

So does a *Ca. Sa.* against the Bail. 2 *Bulst. 55.* And a Sheriff fined for not executing it. *Ibid.*

157. And see the like on a *Testatum Fi' fa'.* 2 *Sand. 193. Hetly 18. Cro. Car. 34. 444. 2 Cro. 484.*

An *Elegit* will lie into *Wales*, a County Palatine. See 3 *Nelson.*

So a *Scire fac'* against the Heir and Tertenants. 2 *Mod. 10.*

So a Writ of Error in real Actions, &c. by *Stat. 28 H. 8. Moor 248.* As in a Writ of Right. *Cro. Car. 226. a Quod ei deforceat. Ib. 128. Siderf. 138. 1 Lev. 105.*

So it seems to lie on an Ejectment, or other mixt Action. *Sed quære, Moor 248.*

C H A P. XVIII.

How the Sheriff is to demean himself in giving Possession and Seisin upon the Writs of Habere fac' possessionem or Seisinam. As to the Manner of Doing, or the Return of a Superfedeas. Where it shall stay the Sale of Lands or Goods, or not. What amounts to a Superfedeas. Where and when a Writ of Error is a Superfedeas. Of Audita Querela.

IN all Cases where the Execution of a Judgment, in which the Demand is of a Thing certain; if the Sheriff do this Thing, he is not any Execution of a Disseisor. But where the Execution is in the Generality, without mentioning of any Thing in particular, there the Sheriff ought to make Execution of the right Thing at his own Peril, otherwise he shall be a Disseisor; for he is bound to take Notice of it, and he had not any Warrant from the Court to make Execution of any but the right Thing. As if a Man recover in *Affize* divers Houses, and after the Tenant reverseth it in a Writ of Error, and a Writ of Execution issues to the Sheriff, to put him in Possession of the Houses which he had lost by the Judgment, altho' the Tertenants are Strangers to the Recovery, and for this they ought not to be ousted without *Scire facias* against them; yet if he do Execution by putting them in Possession by Force of this Writ, he shall not be any Disseisor, for that he hath the direct Authority of the Court to do it. *Pasch. 15 Jac. Floyd and Bethel.*

So in Judgment against the Casual Ejector for 47 Houses, and on *Habere facias possessionem* the Sheriff turns out these 47 Tenants, and 80 other
Te-

Tenants, without any Process or Plea against them.

Per Cur'. We will not grant any Writ to Super-Trespass sede the Execution against the 80 Tenants; for if it should be, it ought to be *quia Erronice*, and there was not any Error in the Proceedings against them, because there was not any Proceedings. But they did advise, that every one should bring *Trespass* against the Sheriff. 2 *Siderfin* 155.

If the Sheriff do deliver Possession of more Acres than are in the Writ, this makes not the Writ erroneous; but in such Case Action on the Case lies against the Sheriff for doing it; or an Affize against him that hath the Possession delivered to him for the Surplusage of the Land. But if the Writ of *Hab' fac' possess.* to deliver Possession to the Plaintiff of Lands recovered by him in *Ejectionment*, contains more Acres of Land than were in the Declaration, the Writ is erroneous. *Pract. Reg.* 287.

Trespass lies against the Sheriff if he does not execute on the right Places. 1 *Keb.* 278. *Luston's* Case.

If a Man brings *Ejectione firma* of 40 Acres of Land, and recovers 30, and not the Residue; upon the Writ of *Execution* the Sheriff may deliver to him any, (*viz.*) Three or more in the Name of all, without setting out the Land recovered by Metes and Bounds, altho' the Plaintiff had not recovered all the Acres whereof he had brought this Action, and whereof he had supposed the Defendant Tenant. But if a Man be to be put in Possession of divers Messuages upon a Writ of Execution, and the Houses are in Possession of several Men, he ought to go to every House particularly, and to deliver Seisin of it, and the Delivery of Seisin of one in the Name of all is not sufficient; for he ought to deliver *plenariam Seisinam*. *Trin.* 15 *Jac. Floyd* and *Bethell's* Case. *Dalt.* 530.

Where the Plaintiff is to shew what Part the Jury intended. In *Formedon* on Non-tenure of three Messuages, the Jury found he was Tenant of one of the Messuages, and not of the other; the Plaintiff may have Judgment, and a Writ to the Sheriff to deliver Seisin: And the Plaintiff at his Peril is to shew to the Sheriff what Messuage it was the Jury did intend; for the Jury is not tied to set Bounds to it. *Cro. Eliz.* 256. *Scriven and Prince.*

Acres to be delivered, according to the Usage. If a Writ of *Execution* goes to the Sheriff, to put a Man in Possession of 20 Acres of Land, the Sheriff ought to give him 20 Acres in Quantity, according to the Usage of the Country where it lies, and not according to the Statute. *Floyd and Bethel. Dalt.* 531.

Of Rent or Common by Parol. If a Man recovers Rent or Common, upon which a Writ issues to the Sheriff to put him in Possession, and the Sheriff comes upon the Land, and delivers to him Seisin of the Rent or Common by Parol that is well made, and the Recoveror is in actual Possession of this. 22 *Affize* 84. *Dalt.* 531.

Where he may break open the Door. That a Sheriff upon an *Habere facias Possessionem*, after a Demand made to open the Door, may break open the Door to deliver Possession of the House. *Semain's Case.* 51 *R.* 91. *Dalt.* 531. See after.

Riotous Possession by Under-Sheriff, &c. If the Under-Sheriff delivers Possession riotously on Extent on a *Statute-Merchant*, and the Sheriff refuseth to return any Jury to enquire of the Force, and he was an Attorney of the Common Pleas, the Court of King's Bench, unless the Cause were depending, cannot take Notice of the Offence without an Information. 2 *Keb.* 541. *Morgatroyd versus Peebles.* *Vide Mo.* 781. & 462.

Where

Where shall be a new Execution or not, and of the Sheriff's Return of his Writ.

The Recoveror is put in Possession by *Habere fac' possessionem*, and the Defendant ousts him again; What Remedy?

In 2 *Brownl. p. 216. Stiles's Case* in *B. R.* by AfterPos-
Williams, he cannot have a new Writ of Execu-^{session}
^{and On-}
tion, but is put to his new Action, and the Filing
of the Writ is not material; for it is within the
Election of the Sheriff, whether he will file or
return it, or not. But if the Execution had not
been fully made, as in the Execution of an House,
some hid themselves in the upper Rooms, and
when the Sheriff was gone, they came down and
ousted those that the Sheriff had put in Possession
before; in such a Case a new Writ of *Execution* New Ex-
was awarded. By the *Chief Justice*, in this Case
of Re-entry, the Court may award an Attach-
ment against him for Contempt against the Court.

But in *Peirson and Traverner's Case*, the Reco- If the
veror is put in Possession by *Hab' fac' Possessionem*, Writ be
and the Defendant ousts him again; if the Writ not re-
be not returned, the Plaintiff shall have a new turned.
Hab' fac' Possessionem. 1 *Roll. Rep.* 353.

And if *Hab' fac' Seisinam* be executed, it is Good
good without Return; yet the Court may com- without
mand the Sheriff to return it. 1 *Roll. Rep.* 77. Return.

On *Habere fac' (Seisinam)* the Sheriff cannot re- May not
turn, That another is Tenant of the Land by return
Right, for that cannot come in Issue between the another
Demandant and him, and therefore he ought to is Tenant.
execute the Writ. 6 *Rep.* 52, *Boswell's Case.*

Upon *Habere fac' Possessionem* the Sheriff return- Return
ed, That in the Execution of the said Writ he that some
came to the House recovered, and removed out were con-
all the Persons he could find, and delivered to the cealed in
the House
and expell'd the Plaintiff, &c.

Plain-

Plaintiff Possession and departed; and soon after three Persons, secretly lodged in the House, expelled the Plaintiff: On Notice whereof he returned again to the House to put the Plaintiff in full Possession; but the others resisted him, so that without Peril of his Life he could not do it. 1 Leon. Pag. 145. Upton and Wells. Dalt. 539.

New Hab. On this Return the Court awarded a new *Ex-fac' poss.* execution. A Writ of *Habere fac' Possessionem* was directed to the Sheriff; a Writ of Error was brought, and a *Supersedeas* granted, directed to the Sheriff to stay Execution: And the *Supersedeas* was shewed to the Sheriff as he was going to do Execution; yet he refused to obey it, and did Execution notwithstanding. This is a great Contempt in the Sheriff, and the Court ordered a Writ of *Restitution* to be granted. 2 Bulstr. 194. Thomas and Owen.

Execution by the Sheriff after a *Supersedeas*.

Return of *Habere fac' Seisinam*.

Virtute istius brevis mihi direct' Justiciariis infrascript' certifico quod (tali die & anno infrascript') *Habere feci A. G. plenam seisinam de un' Messuag. cum pertin' in S. infrascript' in omnibus prout istud breve exigit & requirit. Vide New Ret. Brev. 319. Dalt. 254, 255.*

Note, The Sheriff in Cases where Land is recovered, is to put the Party in Possession and Seisin by a Twig, Clod, &c. of an House by the Key, &c. of Rent by Corn or Grass growing on the Land, out of which the Rent issues. 6 Rep. 52.

It is no good Return, that another is Tenant of the Land by Right, or that he has nothing in the Land.

Land. What returns he may make, or not. *New Ret. Brev. 320, &c.*

Seisin of the Land in one Vill, in the Name of all the Lands in 3 Vills, is good.

Return of Habere fac' Possessionem; & Nulla Bona, on a Fi. Fa.

Virtute istius brevis mihi direct. 24 die Maii Anno infrascript. habere feci infranominat. H. H. Possessionem termini sui infrascript. de tenementis infrascript. cum pertin. prout interius mihi precipitur. Dalt. c. 63. fo. 256. *New Ret. Brev. 322, &c.*

Infranominat. R. B. Miles, nulla habet bona seu catalla terras aut tenementa in balliva mea unde denar. infraspec. Fieri facere possum prout Interius mihi precipitur. *Nulla Bona.*

Note, Upon an Habere facias Seisinam in Dow- He offer-
er, the Sheriff returns that he offered her Seisin of ed her
a third Part, (and shews it to the Court) and that Seisin,
she refused to accept it of him; adjudged a good and she
Return, and no Habere facias Seisinam de novo. refused.
Dyer 11 El. 278. Dalt. 539.

Where upon an Habere facias Seisinam, the She- That the
riff returned, that the Party who ought to take the Party non
Seisin non est Prosecutus breve, and seemed to be a est pros.
good Return. *Floyd versus Bethel. 15 Jac. Roll, breve.*
Tit. Return. 460. Dalt. 539.

Upon an Habere facias Possessionem, The Sheriff Always
returns that he was always ready to deliver Posses- ready,
sion, and that the Plaintiff never came to receive it. and none
Dalt. ut supra. to re-
ceive Pos-
session.

of

Of Superfedeas.

What amounts to a Superfedeas. If the Roll be marked for a Writ of Error before Execution done, the Sheriff shall be excused for doing it before a *Superfedeas* delivered, but this is sufficient to supersede the Execution. 1 *Keb.* 12.
Where Writ of Error is a Superfedeas. If a Writ of Error be brought, and shewed to the Attorney, if Execution proceed, a *Superfedeas quia erronee* may go. But in *Noel's Case*. 2 *Keb.* p. 33.
 Error brought and shewed to the Attorney, is no good *Superfedeas*, 'till it be shewed to the Clerk of the Errors.

Not till Roll mark'd, &c. Till the Roll marked, or the Writ delivered unto the Officer in Court, Writ of Error is no *Superfedeas*, especially after the Return of it. 3 *Keb.* 171.
Recipitur. The Party ought to take Notice of a *Recipitur* upon the Record, if it be entred, and if the Party takes out Execution after the Writ of Error allowed, it is a Contempt, else not; and the Attorney is not bound to view the Record, if a Writ of Error be brought, but may take out Execution if there be not a *Superfedeas*, or Notice given to the Party.

Contempt. *Stile's Rep.* 105. *Winn* and *Stubbins*. It is the Duty of the Clerk of the Errors to mark the Roll, and not the Attorney. *Stile's Rep.* 159. *Mercer* and *Rule*. A Writ of Error is duly pursued, tho' the Roll be not marked; and if neither the Roll be marked, nor Notice given to the Attorney of the other Side of the bringing the Writ of Error, if the Party proceed to take out Execution it is no Contempt to the Court.

No Contempt. Marking the Roll, paying Fees for, or Allowance by the Chief Justice of a Writ of Error is no *Superfedeas*, unless actually taken out before Execution. *Per Twisden*, Error brought and shewed to the Attorney, is no *Superfedeas* until it be shewed to the Clerk of the Errors, which is an Allow-

Allowance in Court, and therefore if Execution be done before it be allowed by the Judge, or shewed to the Clerk of the *Errors*, it is well done, because the Attorney otherwise would never have it allowed, but only shewed to the Attorney of the other Side; but if he shew it, and declare his Intention to have it speedily allowed, there Execution is superseded in the mean Time, but yet if Bail be not given according to the *Statute*, the Exec-Bail gi-tion may be well done, which the Court agreed. *ven in. 1 Keb. 33. Noel's Case.*

Formerly (*per Hale*), if Execution was gone out before a Writ of Error delivered, or shewed to the Party, it was not to be a *Superfedeas*, and by him it shall not be a *Superfedeas*, unless shewed to the Party, and must not foreclose his Time in having it allowed; for if it be not allowed by the Court within four Days it is no *Superfedeas*; and a Writ of Error taken out, if it be not shewed to the Clerk of the other Side and allowed by the Court, it is no *Superfedeas* to the Execution. *Mod. Rep. 112.*

The Sheriff makes his Warrant to a Bailiff to take the Body of, &c. upon a *Ca. sa.* and before the Warrant executed, the Sheriff receives a *Superfedeas*, and the Bailiff having no Notice proceeds; yet the Arrest is not lawful, but the Bailiff is excusable in Trespass. *Moor p. 677. Prince and Alington.*

One purchaseth a *Superfedeas*, and doth not deliver it to the Sheriff till after the fourth County-Day, and then he is outlawed, yet the Outlawry is void. *Moor n. 73. Ca. sa.* was delivered to the Sheriff of *E.* at 11 a Clock, and a Warrant thereupon made to the Bailiff, 4 Hours after a *Superfedeas* comes to the Sheriff, and a Warrant upon this *Superfedeas* delivered to the Gaoler, to set the Parties at Liberty if they were Prisoners, who upon it

it were discharged. *Per' Cur'* the Sheriff hath done, well, being the same Day. *Lit. Rep. 296. Porter and Corbet.*

Upon a *Fi' fac'* to the Sheriff to levy the Debt, and the *Fi. fa.* Defendant brought Error, and had a *Supersedeas*; and Part so much Money as the Sheriff had received before, levied. shall go to Satisfaction, and a *Venditioni exponas* shall issue upon it. *Tel. p. 6. Tocock and Honyman.*

Where a *Supersedeas* as to Goods seized, is a *Supersedeas* *Supersed.* as to Sale; but if the Sheriff hath received the shall stay Money, he must return it into Court. *3 Keb. 174.* the Sale *Mud and Warren*; and it is not discharged by the of Goods, *Supersedeas.* And the Case was, a *Supersedeas* came or not. before Execution, but in Truth after Goods seized and before Goods sold, but after the Sheriff had taken Security for the Money, and discharged the Execution; Sheriff returns that he had received a *Supersedeas* out of Chancery in the Nature of an *Aud. Querela*, it it not good, because the Record was not there. *1 Roll. Abridg. 383. Marston and Mannory.*

See concerning what the Sheriff must do when a *Supersedeas* is sent to him upon an Arrest. *Ca. fa. Fi' fa' Distringas* at the Affizes, & *Habere fac' Possessionem.* *Dalt. Sh. 533, &c.*

Dis- That a Prisoner in Execution may be discharged charge of by Parol of the Plaintiff, and if the Sheriff detain Prisoner him after, false Imprisonment lies. *Ibid.* by Parol.

Upon a *Certiorari.* A *Certiorari* delivered to the Justices of the Peace after Restitution awarded, and before it be executed by the Sheriff, is not a *Supersedeas* to the Sheriff, unless the Justices make a *Supersedeas* upon it, which if they do not, they are finable for the Contempt. *Mo. Rep. 673.*

Taken a- Note, By the Stat. 16 and 17 Car. 2. c. 8. *All way after Stays of Execution by Supersedeas on Writs of Error after Verdict,* are taken away; but the other remains as they did.

Audita Querela on Escape where it lies or not, or upon other Execution by the Sheriff, not well made and delivered.

Vide infra sub titulo, [Where the Escape of one shall be a Discharge of the other, or not.]

Audita Querela is an Equitable Writ, and not Is an Equitable Writ. to be allowed without Equity.

If one in Execution escape of his own Wrong, he shall never have *Audita Querela* to discharge Upon an himself, and the Gaoler may retake him; but if Escape by he escape with the Consent of the Gaoler, the Consent. Gaoler cannot take him again; and if he do, the Party shall have an *Audita Querela*. *Cro. Car.* 240. *Robinson's Case*, 1 *Roll. Abidg.* 307. *Trevillian* and the Lord *Roberts*.

So if the Sheriff arrests one in Execution, and Upon an doth not return the Writ, but suffers him to escape, Arrest in and upon the *alias Capias* he arrests him again, Execution. *Audita Querela* lies. *Mo.* 57. n. 163.

But where Two were bound jointly and seve- Where rally, one was condemned and taken in Execution, two are after the other was sued, condemned and taken; bound, the first escapes, the other shall not have *Audita Querela*, for there must be Satisfaction in Part. *5 Rep.* 67. *Blomfield's Case*.

A Word that is Surplusage, shall not avoid this Where Writ, as in *Arundel's Case*: The *Audita Querela* Surplu- comprehended, that *M.* had recovered against the sage Plaintiff in Debt, and that he was taken by *Cap.* shall not *ad satisfaciend'* at the Suit of *M.* by the Sheriff hurt this Writ. of *G.* who let him go at large, and on Issue upon the voluntary Escape it was found for the Plaintiff. And it was moved, that the Writ of *Audita Querela* was not good, for the Words are, that the Plaintiff *capt. fuit. virtute brevis nostri judicialis*, and this Word *judicialis* is not in the Register,

gifter, but only *brevis nostri de Capiendo*, yet adjudged good. 1 Leon. 73. *Arundell* and *Morris*.

On E- *Audita Querela* on Escape of the Testator's Cre-
scape of ditor, and Recovery against the Marshal. Defen-
Testator's dant *protestando*, that the Plaintiff escaped after
Creditor, the Defendant recovered against the Marshal, and
the Plaintiff did not pay the Marshal, *absque*
hoc that the Marshal satisfied and paid the Testa-
tor. This Case differs from all others of Escape
by Consent of the Gaoler, this being not purely
Debt which goes over to Executors, but is ground-
ed on a Tort General by the Death of the Gaoler;
the Court concluded, that Recovery against Non-
payment to the Marshal, was no Discharge of the
Plaintiff in this *Audita Querela*. But *Adjournatur*,
to take Issue on Payment by the Marshal to the
Creditor, *viz.* the Defendant's Testator. 3 Keb.
763. *Gardner* and *Sedgwick*.

Outlawry One was outlawed in Debt, and taken upon
pleaded the *Capias* and committed to the *Fleet*, and the
to *Audita* Warden suffered him to go at large voluntarily;
Querela, and after, the Executor of the Plaintiff in Debt
where 'tis takes him in Execution again upon a new Writ,
good, or and upon this he brought *Audita Querela*, and
nor. shews this Matter, and Outlawry in the Plaintiff
in the *Audita Querela* was pleaded: *Per Cur'*, it is a
Where good Plea, because this Writ is not directly to
'tis a reverse the Outlawry (as Error is) but is found-
goodPlea. ed upon a Tort, (*scil*) upon the Escape, and not
upon the Record only; *aliter* in Error or Attain-
der. Outlawry is no Plea; nor is there any Dif-
ference as to this Case, where the Outlawry is
at the Suit of the Defendant, or of a Stranger.
Vide other good Reasons. *Sider.* 43. *Jason* and
Kete.

If upon *Elegit*, the Sheriff takes an Inquisition, Where and there are found several Lands subject to the Extent, and found of the several Values; and the Sheriff returns he had delivered some of the said Lands in particular for the Moieties, where it appears, that according to the Values found an equal Moiety is not delivered to the Party who recovers, but more than a Moiety; this is not void, neither is it a Disseisin by the Entry, but only voidable by an *Audita Querela*. *Trin. 15 Car. 1 B. R. Rowe and Weeks.*

If *A.* recover against *B.* Debt or Damages, and *Elegit* is granted to the Sheriff to extend the Moiety of his Land, which is ancient Demesne, although it be admitted that this is not extendible, yet *B.* may not avoid this by Entry, without *Audita Querela*, because the Sheriff had a War-rant to deliver the Moiety of half his Land, and this was his Land, *Ergo* not void. *Hob. p.—Cox and Barnaby.*

See farther of *Audita Querela's*, Statute-Merchants, &c. *Instit. Legalis* 136, 137, 530. 1 *Salk.* 92, 93, 101, 105, 264. *Cumberb.* 14, 214, 325, 326, 328.

C H A P. XIX.

Of Elegits, and the Sheriffs Duty therein, and of the Returns thereof. The Difference of it, as to Lands and Goods, how to be managed by the Sheriff that it may be well executed, and what Things may be executed or not. Of the Inquisition. Returns of Elegit, how to be made. Where a new Elegit shall be had or not. Of Extent by the Bailiff of a Liberty. The Sheriff's Office about Execution for the King's Debt; of Stat. Merchant, Staple, Recognizance: The Difference of the Returns. Returns of Scire facias. The Sheriff's Demeanor as to Outlawries, and Capias Utlagatum, and the Returns.

Of Elegits, &c.

The Nature of an Elegit, as to Lands or Goods

Elegit is a judicial Writ given by the Statute *W. 2. c. 18.* either upon a Recovery for Debt or Damage, or upon a Recognizance in any Court. By this Writ the Sheriff shall deliver to the Plaintiff, *Omnia catalla debitoris (exceptis Bobus & afris Carruca) & medietatem terrarum*, and this must be done by Inquest taken by the Sheriff, for the Valuation of the Goods and Lands ought to be first found by the Inquisition of a Jury. *W. 2. c. 18.* gives the Elegit, so that in Elegit the Sheriff may take in Execution the Moiety of the Land of the Conisor, &c. and all his Goods and and Chattels, (except as aforesaid) and was to deliver them to the Conisee, or he who recovers, upon a reasonable Extent or Price, until the Debt be satisfied, and the Sheriff shall deliver him the Seisin of the Land, and he is called Tenant by Elegit, and shall do no Waste. 3 Co. 12. 4 Rep. 47. Dalt. 133.

The

The *Elegit* as to Goods, is in effect but a *Fieri* As to *fac'*; and therefore if there be no Lands, and Goods. Execution be upon Goods, and they are not sufficient, he may have a *Capias*; *aliter* if Lands be extended.

One prayed to have an *Elegit*, and the Sheriff re- Upon *Ni-*
turn'd he had no Lands, and he prayed a *Capias*, *bil* the
but the Court granted it not; the Cause is, the Party
Entry in the Roll is, that he hath chosen the Exe- a *Capias*.
cution of the Moiety of the Lands which he must
stand to, 30 *Ed.* 3. But the Law now is not so,
for if the Sheriff return *Nihil*, the Party may have
a *Capias*. *Hob.* 57.

Elegit, how to be managed by the Sheriff, that
so it may be well extended, and what Things may
be executed or not.

As to what Things may be extended or not,
you must know.

All the Goods and Chattels, in which are inclu- Leases for
ded Leases for Years, shall be extended, (except Years.
Oxen and Beasts of the Plow) the Moiety of the
Lands. *Vide infra*, how it shall be done.

A Rent-seck, where there is not any Reversion A Rent-
cannot be delivered *ut liberum Tenementum*. *Cro.* seck.
Eliz. 656. *Walsh* and *Heath*.

Annuity Certain is extendible by *Elegit*. *Cro.* Annuity.
Jac. 78. *Tork* and *Twine*.

Lands in Ancient Demesne may be delivered Ancient
in Execution by the Sheriff by force of an *Elegit* Demesne.
out of the King's Court, for the Land it self was
never put in Plea directly in the King's Court. *Vide* the
5 *Rep.* *Alden's Case*, *Hob.* 47. *Cox* and *Barneby*. Million-
Dalt. 532. Act.

If the Lands descend to an Infant, the Sheriff Infant.
shall cease to extend.

Neither are entailed Lands in the Hands of an Entailed
Heir extendible upon an *Elegit* or Statute. *Dalt.* Lands.
532. *Cro.* *Jac.* 85.

As to the Inquisition,

Inquisition void in any Part, void in the Whole. *Note,* If the Inquisition in *Elegit* be void in any Part, it is void in the Whole, and the Whole must be quash'd; and not *quoad* that only; so if more than a Moiety be delivered on the *Elegit*, it is void for the Whole. 2 *Keb.* 582. *Harris's Case*, *Siderfin* p. 91. *Berry and Wheeler*.

Quashing Elegit. It was moved in the said Case of *Harris* to quash an Inquisition of *Elegit* upon Judgment in *B. R.* because it appears not in what County the Lands extended were; but *Monmouth* being in the Margent, and directed to the Sheriff there, and the Return made by him, it shall be intended in *Monmouth*. 2 *Keb.* 582.

The Jury cannot alter a Verdict in Substance. Upon a Writ of *Extendi facias* upon a Statute, if the Sheriff impanel a Jury, and they deliver the Verdict to the Sheriff in Writing, they may after make it more formal, but cannot alter it in Substance; for it is a compleat Verdict by Delivery of it to the Sheriff. 2 *Roll. Abridgment* 712. *d'Albie's Case*.

Elegit vicious upon Omifion. *Elegit* recites the Judgment, *quod Elegit executionem* of the Goods, and of a Moiety of the Lands; and the Writ was, *Ideo tibi præcipimus quod bona & catalla* of the Defendants, *quæ habuit die judicii prædicti redditu deliberari fac'*, omitting these Words, *& medietatem terrarum & tenementorum prædict'*, tenend' the said Goods and Moiety of the Lands, *Quousque debitum levetur*, by Virtue whereof the Sheriff delivered the Moiety in Execution. *Per Cur'*, This shall not be amended, and he ought to have a new *Elegit*; because the Inquisition was taken without Warrant, the Sheriff having no Warrant to extend those Lands. *Cro. Car.* 162. *Walsall and Riches*.

Amendment.
New Elegit.

Two Inquisitions taken at several Days by several Juries upon one Statute-Merchant, were adjudged naught; one was taken of the Land, and the other for the Lands and Goods. 1 Brownl. 38. Two Inquisitions on one Stat. Merchant.

Lessee had a Lease of the Value of 100 l. and after the *Teste* of the *Elegit*, and before the Sheriff had executed the *Elegit*, assigns his Term to one, who assigns it over to the Plaintiff in the *Scire fac'*; and afterwards the Sheriff executes the *Elegit*, and delivers the Lease to the Plaintiff, *Tenend'*, &c. for the Satisfaction of the Debt, which came but to 43 l. 6 s. 8 d. *Per Cur.* The Sheriff could not deliver the Lease at another Value than what the Jury had found it at. And the Sale made by the Sheriff is as strong as if it had been made in open Market, and all the Goods and Chattels are bound after the *Teste* of the *Elegit*, and cannot be sold by the Owner after. 1 Brownl. 38. *Connyers* and *Brandling*. The Sheriff not to deliver the Lease at another Value than the Jury find it. Sale by the Sheriff, as strong as in open Market.

Upon *Elegit* there needs no *Liberate*. *Aliter* upon a Statute. *March* 117.

In every *Elegit* the Sheriff must return and set out the Moieties distinctly, unless they be Tenants in Common; and in that Case he must return the special Matter. 1 Brownl. 38. See *Cumb.* 217. The Sheriff to set the Moieties distinctly.

On Inquisition of a Lease which is but a Chattel, the Sheriff may sell it as Goods; but if he extends it, there shall be no other Benefit than as of a Common Extent. *Id. ib.* Sale or Extent of a Lease, and the Diversity.

Two Persons recovered severally against one in Debt: He who had the first Judgment sued first an *Elegit*, and had the Moiety of the Land delivered in Execution; after the other sued the *Elegit*, and the Sheriff prayed the Advice of the Court. *Per Cur.* He shall deliver but the Moiety of the Moiety left. On the Second *Elegit*, the Sheriff can only deliver a Moiety of the Moiety left.

of that Moiety which he had at the Time of the Writ awarded. *Cro. Eliz.* 482. *Huitt and Cogan. Dal.* 532.

Two *Elegits* and the whole Land extended by them.

S. H. acknowledged two Judgments in Debt to *A.* upon Bond, and was bound to *F.* in a Bond bearing Date before the Judgments. *F.* assigns his Debt to the King. *A.* takes out Execution upon his Judgment, *viz.* Two *Elegits*; by one he has one Moiety of *H.*'s Lands, by the other the other Moiety: Then Process issued out of the *Exchequer* for the Debt assigned to the King. *Per Cur.* It was resolved.

1. This Subject's Title is *prior* to the King's, and the King is bound by the Statute of 33 *H.* 8.

2. *Pasch.* 13 *Fac.* B. C. Rot. 121. *Crook's Case*, adjudged. The two Extents are well executed; because both Judgments are in one and the same Term, and no Priority between them. *Hardr.* p.

23. *Attorney General* versus *Andrews.*

Actual Possession on not to be delivered on *Elegit*, only to enable an *Ejectment.*

Actual Possession ought not to be delivered on *Elegit*, the Sheriff ought only to deliver Seizure to enable the Plaintiff to maintain an *Ejectment*, and the Tenant may plead on the *Ejectment*, else the Tenant would be turned out unheard, and be Remediless; yet if actual Possession be delivered; it is Remediless. 3 *Keb.* 243. *Jefferson and Dawson.*

The Moiety to be delivered by Metes and Bounds.

In *Elegit* the Sheriff ought to deliver the Moiety by Metes and Bounds. *Hutton*, p. 19.

If the Land be first executed upon a Statute, and afterwards an *Elegit* upon a Judgment obtained before the Acknowledging of the Statute come also to the Sheriff, the Moiety of the Land extended shall be delivered to the Plaintiff upon the Judgment. 1 *Brownl.* 38. *Freeman's Case.*

Note, the Practice of Attornies in not awarding *Elegits* on the Roll. *Cumberba.* 232.

The

The Return, how to be made.

Vid. Tit. What Writs need not be returned. See 4 Co. 65. Salk. 310, 318.

Motions for Sheriffs to return their Writs. Cumberb. 12, 25, 141.

The Sheriff's Return cannot be falsified by Affidavits. Ibid. 255.

If a Man sue an *Elegit* upon a Recovery, and *Ca. Sa.* the Sheriff return, That he made Partition of the Lands of the Defendant by twelve Jurors; but he could not deliver the Moiety to the Parties according to the Writ, because all the Land was extended to another upon a Statute. He may after have a *Ca' sa'*, for this Return is all one with a *Nihil* returned. *Mich. 31 & 32 Eliz. Palmer and Knowles.*

If one pray an *Elegit*, and this entred on Record in *Banco*, and takes out the Writ; and before the Return of it the Record is removed into the *King's Bench*, where the Judgment is affirmed within the Year, and after it is affirmed to the Court, that the Sheriff had returned his Writ in *Banco*; yet the Plaintiff may have a *Capias*, for that this Allegation doth not appear to the Court; and now it is impossible it can be returned here, and so it is stronger than if a *Nihil* had been returned. *Trin. 15 Jac. B. R. Andrews and Cope.*

'Twas queried, if upon *Elegit*, the Sheriff ought to return the Extent; and also that he hath delivered the Lands: And *per Cur'*, *Elegit* needs not to be returned. Therefore if the Sheriff by Force of an *Elegit* delivers to the Party the Moiety of the Lands

after an
Elegit.
removed
before the
Return.
What
Return.
Where
there
needs no
Return.
of

git may be Tenant in Common of a fourth Part with the Jointenants: But by this Delivery in Severalty he had in Effect but the eighth Part; for the other Jointenant may occupy the Land delivered with him in Common; if it had been *duorum pomariorum*, it had been good. And he cannot have a new *Elegit* properly; but the Plaintiff shall make a Surmise that the Sheriff *male suggestit* in the Execution of the *Elegit*, and then he shall have a new one at his Peril. *Latch. Rep. 77. Score and Kendale,*

An Extent upon a Statute-Merchant. The Plaintiff put the Conisee in Possession of Parcel of an House and Lands, and suffered the Conisor to continue in the rest of the House, by Reason whereof the Conisor kept the Possession of the Whole, and held the Conisee out. The Conisee, to the Intent he might have a full and perfect Possession of the Whole, caused the Sheriff that he did not return the Writ of *Extent*, on which it is entred on the Roll, *Quod Vicecomes nihil inde fecit nec misit breve*; an *Alias breve extendi facias* may well be awarded. And the Sheriff cannot return, that the Land was formerly extended by the old Sheriff, because by the Entry upon the Roll it appears that no Execution was done; but if the Entry be of the same is an Execution for the Party, though it be not returned. *2 Leon. 12. n. 20. Colehill and Hastings.*

It was said in *1 Keb. 91.* That after one *Elegit* returned, they cannot have another *Elegit* without Continuances. But *per Cur.* the Course is not to make Continuances in the Roll, but awards severally. And *per Cur.* if *Nihil* be returned, he may have a new *Elegit*; but if an Acre be returned, he can have no other.

The Form of the Return of an *Elegit* with Inquisition taken. *2 Sand. 244. Dalt. 547.*

Return with Inquisition.
She-

Entry before Return. Sheriff takes Inquisition upon *Elegit*, the Plaintiff may enter immediately before the Return of it. 1 *Roll's Abr.* 738, *Lister and Bromley*.

Precedents.

Return of *Elegit* with Inquisition taken on it. *Vide* 2 *Sand.* 68.

Upon a *Nihil*.

The Sheriff returns *Nihil* as to Goods and Chattels on the first *Elegit*; yet on the second *Elegit* a Lease for Years was taken in Execution, though the Suggestion for the second Writ was of Lands, and nothing of Chattels. *Mo.* 341, *Hunger and Fry*.

Several Returns.

The Form of the Return of *Elegit*. *Dalt.* 231, 232.

For the several Forms of the Returns upon several *Elegits*, *vide* *New Ret. Brev.* from 206 to 237, and 446, 447.

Return must be on an Inquisition.

Upon *Elegit* the Sheriff returned, That he had delivered to the Plaintiff Goods and Chattels of the Defendant's *ad valentiam* 20 l. *per rationabile pretium*, and shewed what the Goods were in certain; and also that he had delivered 20 Acres of Land of the Defendants, *Quæ est medietas omnium terrarum per rationabile extantum*; but returned no Inquisition, *scil. per Sacramentum* 12, &c. *Per Cur'*, There ought to be Inquisition, and the Sheriff himself cannot extend it. *Dyer.* 100.

In Consideration he would prosecute a new *Elegit*, a Promise to procure the Goods to be found is not good,

Plaintiff declares where the Defendant had seized Goods of *J. S.* by Virtue of an *Elegit*, sued by the Plaintiffs and delivered to the Defendant, being Deputy-Sheriff, he in Consideration that the Plaintiff, at the Request of the Defendant, would prosecute another *Elegit*, and deliver to the Defendant, and authorize some Person to receive the Goods, promiseth to procure the Goods to be found by the Inquisition, and to deliver the Goods to the

Per-

Person authorized. *Per Cur'* the Promise is not lawful, the Seizing of the Goods by the first *Elegit* was not good, for want of an Inquisition: And it differs from a *Fieri fac'*, so that the Defendant is a Trespassor *ab initio*, and this Promise is to make good his *Tort*, and the Sheriff must return a Jury indifferently, and this Promise engageth him to the contrary, and one Part of the Promise being unlawful makes all vicious, Sir Thomas Jones's *Rep. Morris and Chapman, Carter Rep.*

A new *Elegit* issued upon Suggestion, that the Where Party had other Lands in the same County, for if it shall be appeared that one takes Part of the Land upon a new Delivery of the Sheriff, and accepts it, he cannot *Elegit*, after take a new Extent; and if he does, it is wholly void, for then the Record is ended, and the Attornies of both Parties are out of Court; but if it is found that he came into Court, and surmised that the Party had other Lands in the same County, and prayed a new *Elegit*, he shall have it; for this is intended the first Day of the Extent returned, and then it is Reason he may wave it, and pray a new Extent, for he never accepted of the first. *Mo. 341. Hunger and Fry. Cro. Eliz. 310. Mesme Case.*

After a full and perfect Execution had by Extent, Where and returned of Record, there shall never be any Re-ex- Re-extent upon any Eviction; but if the Extent be tent or insufficient in Law, there may go out a new Ex- new Ex- tent; as *Elegit* issued out against G. Esq; who at the Time of suing the Writ was Baronet, it was insufficient since the *Stat. 23 H. 8. cap. 5. Co. Litt. 290, &c.*

Of *Elegit*, and the Return, *vide Fullwood's Case. 4 Rep. Vid. W. W. 2. c. 17. 2 Inst. 39.*

See also *Instit. Legalis 62, 63, 222, to 226. 2 Salk. 563.*

Where

Where Execution shall be awarded upon Elegit, and how the Sheriff shall demean himself upon it, and what Lands shall be delivered, and the Return.

More
than a
Moiety.

If more than a Moiety be delivered upon the *Elegit*, it is void for the Whole. *Siderfin* p. 91. *Berry and Wheeler*.

Of the Sheriff's Extent of a Term, *vide antea*, Tit. *Fieri fac'*.

How de-
livered.

The Sheriff may extend or sell a Lease, and this Sale shall bind the King, because but a Chattel, and no Covin in the Case. 8 Rep. Sir George Fleetwood's Case. Judgment in Debt against a Jointenant for Life, who releaseth to the other and dies. The Plaintiff sues *Elegit*; *Per Cur.* the Release being his own Act shall not discharge his Moiety of the Execution, for by the Acceptance of the Release he has deprived himself of the *jus accrescendi*. 7 Rep. 78. Lord Abergavenny's Case.

What
shall be
delivered

A Rent-seck (where there is not any Redisseisin) cannot be delivered *ut liberum tenementum*. Cro. Eliz. p. 656. *Walsal and Heath*. Annuity certain is extendible by *Elegit*. Cro. Jac. 78. *Torke and Twine*.

Manor.

Where the Sheriff extends a Manor by the Name of Acres, Land, Meadow, Wood; no Ad-vowson passeth. *Owen's Rep.* p. 4. *Brag and Brook*.

Ground-
ed upon a
Testatum.

Upon Recovery in C. B. against G. the Plaintiff prays *Elegit* to the Sheriff of London, where the Action was brought, and to the Sheriff of Lancaster, (as the Course is) by *Sci' fac'* directed to the Chancellor of the County Palatine, and this *Elegit* appears to be grounded upon a *Testatum*, first made by the Sheriff of London, that G. had nothing in London, *ubi revera* they never made such Return, and upon this the Sheriff returned that he took

took a Lease of Tithes, which the Sheriff delivered to the Plaintiff, as the Goods and Chattels of G. for the Debt, and that G. had not *plura bona*, &c. *Per Cur'*, no Return being made by the Sheriff of London, and it appearing that no *Testatum* was ever awarded, it is Error; for the Plaintiff in *B. C. Elegit* might have taken his *Elegit* immediately into ^{to London} London and into ^{and Lan-} Lancaster, yet he hath waved this ^{caster, or} Benefit, and grounds his Execution upon a *Testa-* any other *tum*, which is false, and now G. shall be restored Counties. to his Term again; for the Sale and Delivery of the Lease to the Party himself on an *Elegit* is no ^{On Sale of} Sale by Force of the Writ, and it is in Law but a ^{a Term} bare Delivery in *Specie*, and upon Reversal shall be ^{where the} restored in *Specie*, and doth not alter the Property ^{Term} absolutely, but attends the Goodness or Illness of ^{restored} the Execution. But if the Sale had been to a ^{or not.} Stranger for 100 *l.* though the Value had been 1000 *l.* yet upon Reversal he shall not have the Term, but the Money, for it is the Folly of the Party that he did not pay the Judgment: So on Sale by *Fi' fac'* the Term shall never be restored. *Vide supra Cro. Jac.* 246. *Yelv.* p. 179. *Goodyear* and *Ince.* *Yelv.* 180. *Vide*, where there shall be a Re-extent or no.

If no Return be upon *Elegit*, the Party after the Year and Day shall have a *Sci' fa'*, and after ^{*Sci' fac'*} this a new *Elegit.* ^{*post Ar-*} *Mo.* p. 24. n. 83. ^{*num &*}

See further of Returns, at the End of Chap. ^{*Diem.*}

The Sheriff's Office about Execution for the King's Debt.

After the Stat. 33 H. 8. c. 39. was made for levying of the King's Debt, the usual Process to the Sheriff at this Day is,

QUOD diligenter per Sacrament. proborum & legalium hominum de balliva tua inquiras, &c. quæ & cujusmodi bona & catalla & cujusmodi pretii idem debitor habuit in dicta balliva tua, &c. Et ea omnia capias in manus nostras ad valuationem debiti præd. & inde Fi. fac. debitum præd. &c. Et si forte bona & catalla prædicti debitoris ad solution. debiti prædicti. non sufficerent tunc non omitas propter aliquam Libertatem quin eam ingrediaris & per sacrament. præd. proborum, &c. diligenter inquiras quas terras & quæ tenementa & cujusmodi Annuï valoris idem (debitor) habuit seu seifitus fuit in dicta balliva tua, &c. Et ea omnia & singula in quorum manibus jam existunt extend. fac. & in manus nostras capias, &c. Et capias præd. (debitorum) ita quod habeas corpus præd. (debitoris) ad satisfac. nobis de debito præd.

Returns. For the Return of Extents out of the Exchequer, vide New Ret. Brev. from p. 50. to 84. idem 250. &c.

If Goods be sufficient, the Lands are exempted Whereby it appears that if the Goods and Chattels of the King's Debtor be sufficient, and so can be made to appear to the Sheriff, whereupon he may levy the King's Debt, then ought not the Sheriff to extend the Lands of the Debtor or his Heir, or of any Purchaser, or Tertenant.

The King to be preferred. If one extends a Statute-Staple at the Suit of A. the Sheriff extends the Lands, and takes the Goods, and seizeth them into the Hands of the King, but does

does not make Livery, and after a Writ of *Prerogative* of the King issues out of the *Exchequer*, and commands the Sheriff to levy the King's Debt of *B.* (*viz.*) 100 *l.* of the Goods of the Debtor; and if he had not sufficient, then to extend his Lands; and this is delivered to the Sheriff after the first Writ of *Extent*, but that was not returned. The Sheriff in this Case ought to execute the *Extent* for the King's Debt; because the Property of the Goods and Property Lands were not in *A.* before they were delivered to him by a Writ of *Liberate*, and the Goods being seized into the Hands of the King for the Use of the Party, were privileged from all other Executions, but that of the King only. 2 *Roll. Abr.* 158. *Dy-Liberate.* *er* 67. *Stringfellow's Case.* *Hob.* 339.

Where the Officer without any Warrant or Authority shall levy any Duty for the King, and shall after account for the same in the *Exchequer*, or otherwise, pay the same to the King's Use, there the Officer seemeth chargeable but as a Trespassor; but if he shall convert the same to his own proper Use, it is Felony.

If a Man be bound in a Statute-Merchant (and does not pay the Debt at the Day) Execution shall be done thereof in this Manner: The Conisee must come to the Mayor or other Officer, before whom the Statute was acknowledged, and pray him to certify the same into the *Chancery*, under his Seal, &c. and if he will not certify it, then a Writ of *Certiorari* must be sued forth of *Chancery*, directed to the said Officer to certify the Acknowledgment of the said Statute into the *Petty-Bag* Office in *Chancery*, and upon the Certificate a Writ of *Execution*; *scilicet*, First, a *Capias* shall go out to the Sheriff against the Body of the Conisor (*si Laicus sit*); but the Debtor, after he is taken, hath Liberty given him (within a Quarter of a Year) to sell his Lands and Goods to discharge his Debts:

And

The Office and Duty of Sheriffs, &c.

And if he do not agree for his said Debts within the next Quarter, or if he cannot be found, then all his Lands and Goods upon *Extendi facias* shall be appraised by a Jury, and shall be delivered to his Creditors by a reasonable Time, to hold till the Debt be fully paid; and yet the Body of the Debtor, if he be taken, shall remain in Prison until the Debt and Damages be paid. And this Writ may be returnable into the C. B. or B. R.

Franchise.

Tho' it be within a Franchise, the Sheriff is to execute it himself.

Clericus.

If the Sheriff return, That the Debtor is a Clerk, then an Extent shall go out against his Lands and Goods only.

Sureties.

If the Debtor find Sureties, they shall be ordered in all Things as the Principal; *scilicet*, as to the Arrest of their Bodies, and Delivery of the Lands and Goods.

Statute shewed.

The Statute ought to be shewed to the Court, where the *Certiorari* is returned.

Note.

The Creditor, out of the Profits of the Lands, is to find the Debtor Bread and Water in Prison. *Vid. Dalt. lib. 199, 120, &c.*

Of Statute-Staple. 2 Salk. 563.

Staple of two Sorts.

A Statute-Staple is of two Sorts:

1. *Per Stat. 26 Ed. 3. cap. 9. & sic propriis dicitur*, and is acknowledged before the Mayor of the Staple.
2. *Per Stat. 23 A. 6. c. 6.* before one of the Chief Justices, or before the Mayor and Recorder of London. *Dalt. 122.*

A Statute-Staple must be certified in Chancery as a Statute-Merchant, and on that Certificate Execution shall go presently forth against the Body
(*fi La*)

(*si Laicus sit*,) and Lands and Goods of the Conifor, returnable into *Chancery*, in the *Petty-Bag* Office there, and not into *B. C.* or *B. R.* as a *Statute-Merchant*.

The Sheriff on this shall take the Body of the Conifor, and *per Sacramentum proborum, &c.* presently extend, and prize and seize into the King's Hands his Lands, Goods and Chattels, and shall certify the Appraisement into *Chancery*.

Upon which the Conifor shall have a *Liberate* to the Sheriff, to deliver these Lands and Goods to the Value of his Debt; and shall not be delivered to him by the Sheriff before the *Liberate*. *Dalt.* 123.

Of Returns on *Statute-Merchant*, *Staple* and *Recognizance*; and the Sheriff's Demeanour in the Executions.

Before I speak of the Returns, it will be needful to consider the Writs themselves, and the different Forms of them, for they are the Sheriff's Directions.

The Writ of *Execution* upon a *Statute-Merchant* is for Lands and Goods thus: *Statute-Merchant.*

QUOD *Vic' omnia bona & catalla terras & tenementa quæ fuerunt prædicti (le Conifor) sine dilatione Liberari faceret per rationabile pretium & extentum tenend' ut liberum tenementum, &c.*

And he is not commanded to do it *per Sacramentum proborum, &c.*

U

But

But the Writ of Execution upon a Statute-Staple, and upon a Recognizance in the Nature of it (on 23 H. 8.) is,

QUOD Vic' omnia terras & catalla per Sacramentum proborum & legalium hominum de balliva sua per quos, &c. juxta verum valorem diligenter extendi & appretiari faceret & in manum nostram seifiri faceret ut ea prefato (le Conisee) quousque sibi de summa predicta satisfactus fuerit, liberari faciamus, &c. Et qualiter, &c.

Effect of these Writs. So that as ye may observe by these Forms, by Force of the Writ on the Statute-Merchant, the Sheriff may deliver the Lands and Goods presently upon the Extent to the Party. But by the Writ on Staple-Statute, or Recognizance, in the Nature of it, he is to extend the Lands and Goods, and to seize them into the Hands of the King; but not to deliver them to the Party without a *Liberate*.

Difference between Proceedings in a Statute-Merchant, and Statute-Staple. The Proceedings in a Statute-Merchant, is a *Capias*, and if the Sheriff thereupon return a *Cepi Corpus*, then he shall remain in Prison a Quarter of a Year, within which Time he may sell his Goods and Lands to pay his Debts, and this by the express Words of the Statute of 15 H. 7. c. 16. but if the Sheriff return *Non est inventus*, Execution shall be granted of his Lands and Goods.

Statute-Staple speedier Remedy. But in a Statute-Staple and Recognizance, the first Process is to take his Body, Lands and Goods all in one Writ; for this is by the express Words of the Statute, and is a more speedy Remedy than the Statute-Merchant.

Now

Now on a Statute-Staple and Recognizance, the Writ of *Execution* upon Return of the Conisor ^{Conisor} dead, is to extend the Lands *necnon catalla*, which were of the Conisor at the Time of his Death: And this is the constant Course, as appears by Records of *Extents* which are in the Rolls.

On Extent of a Statute-Merchant the Sheriff ^{Non est} returns, That the Body cannot be found, and that ^{inventus.} he had extended the Lands, and delivered them to the Plaintiff. *Reg.* 146.

The Sheriff may return *Non est inventus, nec habet bona nec terras*; the Sheriff returned the Conisor *mortuus*. *Dyer* 299.

Upon Extent of a Statute-Merchant or Staple, ^{Clericus.} the Sheriff may return, That the Debtor is Clerk. If he return *Tarde*, or *Mandavi ballivo Libertatis, Tarde*, he shall be punished.

Lands in ancient Demesne shall be taken in Exe- Ancient
cution on a Statute; but not Copyhold Lands. ^{Demesne}
4 Rep. 67. *5 Rep.* 105. ^{Lands.}

Where the Debt of the Conisor appeareth in the Fee-sim-
Return, there of Necessity his Seisin must be ple.
found to be of an Estate in Fee-simple only.
Dyer 299.

Execution upon Recognizance *per Stat.* 32 *H.* 8. ^{Recogni-}
c. 6. hath the Effect of a Statute-staple. ^{zance.}

Retorn' Liberate post Extent' fact' super Oblig'
Statut' Stapulæ.

Virtute, &c. Liberavi infranominat' B. S. mane-
ria terras & tenementa infrascript' habend' si-
bi & assignat' suis ut liberum tenementum suum
quousq; sibi de debito infrascript' una cum damnis
misis & expensis suis plenarie fuerit satisfact'
prout, &c. *Vide Dalt.* 261. *New Ret. Brev.* 338.

Retorn' de Extent' super Recogn' vel Stat'.

Virtute istius brevis mihi direct' cepi corpus infra-
nominat' W. W. cujus quidem corpus ad diem
& locum infracontent' paratum habeo prout interius
mihi præcipitur.

Resid' Executionis istius brevis patet in quadam
Inquisitione huic brevi annex'.

A. B. Armig' Vic'

War'. **I**nquistio indentat' capi' apud C. in Com'.
præd. 12 die Jan. Anno, &c. coram A. B.
Armig' Vic' Com' prædict' Virtute brevis Dom' Re-
gis mihi direct' & huic Inquisition' annex' per Sa-
cramentum T. B. &c. (Et sic XII.) qui dicunt su-
per Sacramentum suum quod W. W. in brevi præd'
nominat' die Recogn' debet' in eodem brevi spec' fuit
seisitus in dominico suo ut de feodo de & in mane-
rio de A. in Com' præd' clar' annui valoris in omni-
bus exitibus ultra reprisas 100 l. Et ulterius Jura-
tores prædict' super Sacramentum suum prædict'
dicunt quod præd' W. W. die recogn' debet' præd'
seu unquam postea nulla habuit bona seu catalla,
neque al' sive plura terr' sive tenementa in Com'
præd' ad eorum notitiam quod extend' appretiar
aut in manus dict' Dom' Reg' capi aut seisir' possint.
Quæ quidem manerium terr' & tenementa prædict'
cum pertinent' ego præfat' Vic' die caption' hujus In-
quisition' cepi in manus dict' Dom' Reg' per Ex-
tent' præd'. In cujus rei testimonium tam ego præ-
fat' Vic' quam Jurat' præd' huic Inquisition' si-
gilla nostra alternatim apposuimus die anno & loco
supradict', &c.

A. B. Armig' Vic'.

Extent

Extent on a Statute-Merchant issued out against R. the Conisor; the Sheriff returned, That the Conisor was possessed of divers Goods, and seised of Lands, which he delivered to the Conisee, and that the Conisee accepted of the Land; and because the Sheriff did not return, That he had not any other Lands, Goods or Chattels; it was adjudged insufficient, and a new Writ awarded; tho' some held it was well enough in the Case of a Conisor, but not in the Case of a Purchaser. *1 Brownl. 37. Fletcher and Robinson.*

Note, If the Conisor be returned dead, Execution shall be granted against his Executor, without *Scire fac'* to have Execution of his Goods; so against the Heir and Tertenants of his Lands without a *Scire fac'*: *Quare.* 15 H. 7. 16. b. 2 R. 3. 8. b.

If the Sheriff do not return the *Capias*, or re- turn *Tarde*, or that he directed it to a Bailiff of a Franchise, he shall be punished, and yield Damages to the Party grieved, according to the Statute of *de Mercatoribus, W. 2. cap. 39.*

Two Inquisitions taken at several Days by several Juries upon one Statute-Merchant, were adjudged naught: One was taken of the Lands, and the other for the Lands and Goods. *1 Brownl. 38.*

If another had these Lands in Execution by *Ele-* git, or is in by Discent; in such Cases the Sheriff shall return the special Matter, *i. e.* in the first Case, that he hath extended the Land of the Defendant: But he cannot deliver the same to the Plaintiff, for that another had the same in Extent before. *Dalt, 125.*

The Office and Duty of Sheriffs, &c.

Gather-
ing the
Goods.

The Sheriff having an Extent upon a Statute, may gather the Goods all into one Place to be viewed and appraised by the Jurors, and he is not a Trespasser. *Mo. 563. Attorney General ver-
sus Crocker.*

As to what Lands, &c. shall be extended upon Statutes, &c. it does not properly belong to this Treatise which hath a Respect only to the Office of Sheriff; but see *Dalt. ch. 26.*

Scire fac'
and new
Writ of
Execution,
where.

Note, If Lands delivered in Execution (on a Statute-Merchant, Staple or Recognizance, or upon Recovery of Debt and Damages) are lawfully recovered or evicted out of the Possession of the Conisee, before his Debt and Damages be satisfied, he shall have *Scire fac'*, &c. and upon this a new Writ of *Execution* or *Re-extent* to levy the Residue, *per Stat. 32 H. 8. cap. 1. 1 Inst. 289, 290. 5 Rep. 87.*

By whom.

Note also, It is a Question in 2 *Brownl. 270.* King James incorporated the Mayor, Bailiffs and Burgeses of *Berwick*, and granted to them the Execution and Return of all Writs; Whether an *Extendi facias* shall be executed by them, or by the Sheriff of *Northumberland*?

Berwick.

Some said, *Berwick* is *English*, which appears by the Act of Parliament which confirms the Letters Patents, and also they send Burgeses to Parliament.

Others said, It is Part of *Scotland*, and a Sheriffwick. An Obligation there shall not be tried in *England*; and it is not in the County of *Northumberland*, nor Part of it.

By *Siderfin p. 382.* our Laws are not current there: But yet in *Jackson and Crisp's Case*, Local Breach

Breach of Covenant at *Berwick* tried at *Belford* in *Cumberland*. 2 *Brownl.* 270. 2 *H.* 7. 31. 26 *H.* 23.

For Execution upon a Recognizance, *vid. Dal-* Recogni-
ton of Sheriffs, Ch. 27. zance.

Returns on Scire facias.

Scire facias is a Writ Judicial, directed to the Sheriff, &c. and is usually to warn a Man to come and shew Cause to the Court, &c. why Execution of a Judgment shall not be done. But this Writ shall not be granted before the Year and Day past, after Judgment given. *Dalt.* 161.

Conisor in a Recognizance dies, *Scire fac'* goes ^{Return} against his Executors, & *Hæredes terrarum*, &c. ^{not agreeing with the Writ.} Sheriff returns, That he had no Executor; & *Scir' feci W. H. filio & hæredi prædict. M. (le Conisor.)* This Return agrees not with the Writ, yet it may be good. 3 *Rep.* 15. *Sir William Herbert's Case.*

Scire fac' on a Recognizance in *Chancery* against ^{*Sur Recog.*} C. who was returned dead, then a second *Scire* ^{*in Canc.*} *fac'* issued against the Heir of C. and against the Tenants of the Lands of C. which he had *tempore Recognitionis vel postea*. The Sheriff returned C. Tertenant, and omitted to return any Thing against the Heir. This is a Non-return of the Sheriff, and not a Misreturn, and is not aided by any of the Statutes of 32 *H.* 8. or 18 *Eliz.* or 21 *Jac.* of *Jeofail*. It is Error: The Tertenant without the Heir ought not to be charged; therefore the Heir ought to be summoned, for the Heir may have a Release to plead, or other Matter to bar the Execution. Also if the Heir be within Age, the Parol shall demur, and the Tertenant shall have Advantage thereof: And a new *Scire fac'* issued *ad Informand' Curiam*; and the Return was,

That he had not any Lands in his Bailiwick that descended to his Heir, nor any Heir within his Bailiwick, and good enough; though it had been better, if he had returned who was Heir, and that he was warned, or that there was not any Heir in the said County. *Cro. Car.* 295. *Eyres and Taunton.*

Words
of the
Writ not
answered
in the Re-
turn.

The Writ commands the Sheriff to give Notice to the Tenants of the Land in Fee-simple, and the Sheriff returns not, That those which he had not returned were Tenants of the Land in Fee-simple, and so the Words of the Writ are not answered, 1 *Brownl. Rep.* 145, 146.

So many
Tenants.

The Sheriff may return 24 Tertenants of the Whole, and every Tenant may plead in discharge of himself; or he may return, That each is Tertenant of so many Acres. 2 *Keb.* 601. *Henshaw's Case.*

Conisor
returned
dead.

Scire fac' to have Execution on a Recognizance. The Sheriff returns the Conisor dead; other *Scire fac'* Issues against the Tertenants of the Conisor, on which the Sheriff returns a *Scire feci* to *W.* and *R.* Tenants; and further, that there was no Heir nor any other Tenants, *quibus Scire fac' poterit, & la forme.* 1 *Keb.* 621. 2 *Sanders* 6. *Jefferson and Moreton.*

*Nullus ha-
res.*

Scire facias against the Heir and Tertenants, the Sheriff returns no Heir, and the Tertenants appear, *& la form.* 2 *Sanders.* *Jefferson's Case.*

Tenents
summon-
ed.

Scire facias to Tertenants, the Sheriff returns they are Summoned, *la forme.* 2 *Sanders* 6, 8, 232.

*Scire fac'
ad audiend'
Errores.*

Scire fac' ad audiend' Errores must be delivered to the Sheriff. 1 *Roll, Rep.* 329. *Sir Thomas Middleton's Case.*

If a Special *Scire facias* do issue forth, a *Nihil* Special cannot be returned upon it, for *Nihil* is a general *Scire fac'* Return, and the Writ is Special. *Pract. Reg. tit. ret.*

The Return of the second *Scire fac'* ought to bear Date on the Return of the first *Scire fac'*. *Ret. of the second Scire fac' when to bear Date.*

Return de Scire fac'.

Virtute istius brevis mihi direct' per A. B. & C. D. probos & legales homines de Balliva mea *Scire fec'* infranominat' J. S. qd. sit coram *Ju-*sticiariis Domini Regis (if it be in the Common Pleas) *vel coram Domino Rege* (if in the King's Bench) *vel coram Baronibus Domini Regis* (if in the Exchequer) *ad diem & locum infra script. ad ostend. & proponend. si quid pro se habeat vel dicere sciat quare, &c.* (according to the Matter contained in the Writ) *prout mihi interius præcipitur.*

Infranominat. A. B. nihil habet in Balliva mea per quod ei *Scir'* facere possum, neque est inventus in eadem (if the Return be in Chancery) — *qd' sit coram Domino Rege in Cancellaria.*

Two *Nibils* returned countervail a *Scire fec'*.

To *Scire fac'* *sur Recognisans*, Sheriff returns that the Defendant is dead. 2 Sanders.

Scire fac. *Vid.* Tertenants, the Sheriff returns they are Summoned. 2 Sanders 8.

For the several Returns on *Scire facias*, vide *New Ret. Brev.* from 283. to 396. & 470.

The

The Sheriff's Demands, and Office, as to Outlawries and Capias Utlagatum, and Return.

The Manner of suing to the Outlawry.

He which is sued in a Personal Action, if he do not appear on the Mean Process, then the *Exigent* is directed to the Sheriff to call and proclaim him in five County-Court Days, one after another, to answer to the Law; and when upon the *Exigent* the Sheriff returns *quod non comparuit*, upon his Return the Plaintiff shall have a *Cap. Utlagatum* against the Defendant; but if the Defendant appear upon the *Exigent*, he shall have a *Superfedeas*.

Return reddidit se.

Where upon the *Exigent* the Sheriff returneth *Reddidit se*, he must have the Body in Court at the Day of the Return of the Writ, except the Party be sick.

Coroners absent.

The Sheriff may return the Coroners were absent.

As for the Forms of these Returns, *vid. Dal. cap. 59. and New Ret. Brev. from 237. to 245.*

Bailiff of a Franchise cannot execute it.

A *Capias Utlagatum* is a *Non omittas* in it self, and therefore the Bailiff of a Liberty cannot execute a *Cap. Utlagat.* and if the Party be in the Hands of the Bailiff, the Sheriff may take him.

Sheriff not to put the Party out of Possession.

If a *Capias Utlagatum* issues to the Sheriff to take the Party, and to enquire what Lands and Tenements he had; the Sheriff finds by Inquisition that he is seised of many Lands, and continues Possession in them; he cannot put the Party out of Possession by Force of that. *Winch. p. 78.*

Return as to the Hustings in London.

An Outlawry returned in London in these Words: *Ad Husting. tentum in Guildhall Civitatis London tali die A. B. exactus fuit & non comparuit* :

Writ : This is no good Return, because there are two Hustings in London, one is *de Communibus Placitis*, and the other is *de Placitis Terræ* ; in such Case the Return must be *apud Husting de Communibus Placitis*.

The City of *Norwich* is within the County of *Return Norfolk*. Also it is a County in it self, which may where the hold Plea. And therefore if a Return be made City is in these Words, *Ad Com' tentum apud Norvicum City and County in Com. Norfolc*. This is not good, for that it may have two Intendments, (*scilicet*) that the County which was held there was for the City, or for the County of *Norfolk* : But if the Return be in these Words, *Ad Comitatum Norfolc' tentum apud Norvicum in Comit. Norfolc*. it is good, for now it cannot be intended, but only that their County was held for the County of *Norfolk*. II H. 7. 10. b.

In a *Cap. Utlagat*. the Sheriff returned, that Protection the Party who was arrested had a Protection on re- from a Peer of Parliament, it is ill ; and Day turned. was given to the Sheriff to amend his Return. *Winch p. 24.*

Proclamation was directed to the Sheriff of Procla- *Cheshire* against *J. H.* and the Writ was returned, mation *Tali die ad Comit. meum tent' en le Shirehall, &c.* returned. *Proclamationem feci ac eod. die ad General' Session', &c. Proclamationem feci* ; and this Matter was pleaded in Avoidance of the Outlawry to reverse it, because the Proclamations were made one Day, and the Writ was *tribus specialibus diebus, &c.*

Per Curiam, It is an ill Return, and the Sheriff was amerced for it. *Goldsborough III.*

By the Custom of *London* the Writ was directed *London*. to the Sheriff of *London*, and not to the Coroner (who is Mayor.)

The

Return
Outlaw-
ry.

The Return of the Outlawry out of London in B. R. is generally made without saying *per judicium Coronat.* 2 Roll's Abr. 806.

Error.

Error to reverse an Outlawry in the County of Lancaster, for that the Sheriff returned *quod ad Com. Lancastriae tent. ibid.* where it should have been *ad Com. Lancastriae tent. apud Lancaster*, or at some other Place certain, and it was reversed. 9 Rep. 94. Dyer 105.

Return
Exigent.

The Exigent was returned, *ad Com. tent. apud castrum de Exon' primo exactus fuit, &c.* and because it was not set down in what County, it was

Reversal.

held to be erroneous. One was returned Outlawed, and for that it did not appear that it was *per judicium Coronatorum*, it was reversed, and that without any Writ of Error.

The Form
of Re-
turns.

Vid. cap. 1.

Virtute istius brevis mihi direct. cepi corpus A. B. infranominat. cujus corpus coram Justiciariis infrascript. ad diem & Locum infracontent. parat. habeo prout interius mihi præcipitur, residuum vero Executionis istius brevis patet in quadam inquisitione huic brevi annex.

So on non est inventus, residuum vero, &c.

Inquisitio Indentat. capt. apud, &c. Qui dicunt super Sacramentum suum qd. J. S. in dicto brev. nominat. nulla Bona neque Catalla Terr. sive Tenementa habuit aut tenuit in Com. præd. die Jovis prox. post festum Sanct. B. Martyr. Anno Regni Domini Regis nunc tertio in dicto brevi specificat. nec unquam postea, quæ in manus dicti Domino Regis capi ac seisciri possunt ad notitiam Juratorum prædict. In cujus rei Testimonium tam sigillum Com. præd. quam Juratorum præd. huic Inquisitioni Indentat. sunt appensa dat. die anno & loco supradict.

Other Returns in Capias Utlagat. Vide Dalton, 215. cap. 54. New Ret. Brev. 160, 161, &c.

Retorna de Exigent, vid. Dalt. 236. New Ret. Brev. 238, &c.

The Judgment is, *Ideo Utlagat' Coronator', &c.*
1 *Inst. 288.*

The Profits of Lands of the Person outlawed in Personal Actions, the Sheriff may seise without any Office, and also the Goods.

And *Note*, By a Statute made 4 & 5 W. & M. 4 & 5 cap. 18. 'Tis enacted, That no Person outlawed in *W. & M. B. R.* for any Matter, Cause or Thing (Treason and Felony only excepted) shall be compelled to Outlaw-
come into, or appear in Person in the said Court, *&c.* vers'd,
to reverse such Outlawry; but may appear by At-
torney, and reverse the same, without Bail in all
Cases, except where special Bail shall be ordered
by the said Court.

So that a Person outlawed (except as aforesaid) may now appear by Attorney, and then some Friend, or his said Attorney must undertake to pay the Fine and his Fees, and then the Outlawry may be reversed: But 'tis held, That this Act does not *Rescue*
extend to a Rescue returned, *&c. Vide Cap. return'd.*
Prox.

C H A P. XX.

Where and in what Cases Action lies against a Sheriff for a Rescous, and what Action. Diversity between Mean Process and Execution: Where the Sheriff makes himself chargeable by his Return. Where and what Remedy against the Rescouer by Action or Indictment. Of Return of Rescous. What is good or not. Of Laying the Action, and how to declare. Of Rescous and Pleadings in it. The Venue in this Action.

Of Rescous.

Where and in what Cases Action lies against the Sheriff for a Rescous, or not.

If in the Arresting.

If in bringing to Gaol on Mean Process.

If brought to the Gaol.

IF in the Arresting the Party is rescued, be it on Execution or Mean Process, no Action for this lies against the Sheriff: And if the Prisoner be arrested on Mean Process, and as he is bringing to the Gaol he is rescued, no Action lies against the Sheriff, for the Sheriff cannot be supposed to have the *Posse Comitatus* upon every Mean Process; *aliter* if it be upon Execution, there *Caveat Vicecomes*. But if he be arrested upon Mean Process and brought to the Gaol, then it is no good Return for him to say, the Gaol was broken, and so he was taken from him. And therefore, Action on the Case was brought against the Sheriff of London and Middlesex on Escape; they plead, they have taken the Party on a *Latitat*, and that in bringing him from *Islington* to the Gaol, Rescous was made of him from them, and so return the Rescous. 16 Ed. 4. 3. *Bastard Faulconbridge's Case*. 2 Bulst. 198. May and Proby. Cro. Jac. 419. Mo. 852. Cro. El. 868.

Noy

Noy 40. 1 Roll. Rep. 388. Roll. Abr. 98, *Mesme Case*. Popham 192. Dalt. 534.

Per Cur', The Plea and Return is good, not-*Rescous* in withstanding *Waldoe* and *Lambert's Case*, 44 *Eliz.* bringing. *B. R.* and that upon the former Differences; and the Difference between Mean Process and Execution was enforced in this Case. If the Sheriff takes one in Execution for Debt, and after he suffers Difference to him to escape, the Debt is gone, and the Process between him to escape, the Debt is gone, and the Process between served; therefore in such Case, if he should not have his Remedy by Way of Action against the Sheriff, he should be without Remedy: But not so in Mean Process and Execution. Mean Process, for there the Party may be taken again. See 6 *Mod.* 141.

Action of Debt lies against the Sheriff upon a *Cepi corpus* Cap' returned *qd' cepit Corpus*, and he was rescu'd. and Rescued. 2 Roll. Rep. 57, 58.

No *Rescous* can be on a *Fieri fac'* for Goods, Not on but in such Case the Party shall have Action on *Fieri fac'*. the Case: And a *Rescous* lies only on a *Capias* which lies against the Person, and *Cro. Car.* 515. *Sly* and *Finch's Case*, which is full as to the Point, and was as follows. *Litt. Rep.* 297. the Sheriff of *Surry* and *Alderton's Case*. *Hetly* 145. *Mesme Case*. Dalt. 534.

Scire fac' was brought against *Finch*, Sheriff of *Glouc'*, for that the Plaintiff having brought a *Fieri fac'* directed to *Finch*, he returned that he had taken Goods into his Hands to the Value of 72 *l.* and had sold as much of them as amounted to 11 *l.* and the Residue remained *pro defectu emptorum* till such a Day, at which Time he putting them to Sale, they were rescued from him; And Part upon which Return the *Scire fac'* was brought was rescued at the Sale. to shew Cause, why the remaining Debt should not be levied on his Goods: To this the Defendant demurs. All agreed that the Return is not good: But the Question was, Whether he hath charged

charged himself by this Writ. *Cro. Car.* 515. *Sly and Finch.* *Sanders* 340, 343. *Mildmay and Smith.* 2 *Keb.* 789, 821. *Mesme Case.* *Vide antea Chap. 9.*

Where the Sheriff makes himself chargeable by his Return. And *per Cur'*, he is chargeable by this Return. If he had returned only *qd' remanent pro defectu emptorum*, therein had he done his Office, and in such Case on the Election of a new Sheriff, a *Distringas Vicecom'* shall issue to sell the Goods, and to deliver the Money to the new Sheriff. But when he saith further, that they were rescued out of his Hands, therein he hath misdemeaned himself: And by *Dodderidge*, the Sheriff hath charged himself by this Return, as well in Regard of his Misdemeanor, as also that he hath his Remedy over against the *Rescouffers*: Nor can the Court award a Writ of *Vendit' exponas*, because it is against his Return. But if it be objected, that perhaps he had seised the Goods again, so as he may sell them on a *Vendit' exponas*, if so, then he ought to have pleaded it to the *Scire fac'*, and it had been good.

Vend' expon'.

Plea.

Action on the Case.

If Action against the Parties that rescued. *Lynn and Cunningham's Case.* It was a great Question, If one should have Action against the Parties that rescued? Three Judges were of Opinion he should, though it was well objected, If he shall have Action against the Party, he shall also have Action against the Sheriff, and so be twice satisfied; and the Sheriff shall have Action against the Party, and so he shall be twice charged.

Election of Action. By *Richardson*, a Man in some Cases shall have Election of Action, and both are but to recover Damages; a Man had an Execution against one, another saw the Man and conveyed him out of Sight;

Sight; Action on the Case lies against him, and perhaps the Sheriff is dead, and he shall have no Remedy.

Harvey *ad idem*: The Law gives a Man Remedy against the Party that doth the Wrong. Case lies. If an Action on the Case will lie for hindering a Sheriff in executing his Office, as it was adjudged in *Semain* and *Gresham's Case*, 5 *Rep. a fortiori* when it is actually done, and he is rescued out of Custody.

Cro. *ad idem*, That the Action will lie; there is Action a Mischief on both Sides; the Defendant may be will lie. twice charged, and the Plaintiff may lose his Debt; and if the Sheriff brings the Action, he may plead the Recovery by the Plaintiff. When the Sheriff has made his Return of the *Rescous*, there is no Remedy against him; and if the Party taken be rescued before he be brought to the Gaol, there is no Remedy against the Executors of the Sheriff. If Debt be brought against the Sheriff, and in that a Recovery, the Plaintiff shall never take the Defendant again; and so if he bring Action against the Party and recovers, the Sheriff may plead that; and *Fitz. N. B.* 12. is doubtful.

Hutton *contra*, That the Action doth not lie. *Econtra*, The Difference is good where a Man is arrested up- and Dif- on Mean Process and rescued, and after becomes ference. *non solvent*, so that they who rescued him are the Cause of the Loss of my Debt, it is a Wrong upon which he may be indicted, yet the Party shall not have Remedy against him, because he may proceed. *Telverton* of the same Opinion, and agreed the Difference.

By Hutton, Upon Mean Process the Sheriff ne- Sheriff ver had Remedy for the *Rescous*, but he shall re- has no turn the *Rescous*; but upon Execution he shall not Remedy return the *Rescous*, but have an Action, and the on Mean Process, Party

Party is not prejudiced, for he shall have an Action against the Sheriff, tho' in Judgment of Law the Party is liable,

Remedy against the Rescouser by Action and Indictment.

Where the Rescouser shall be doubly punished.

The Rescouser shall be doubly punished by the King, and by the Party; upon the Return of the Sheriff, he shall be fined to the King, and Attachment shall issue out against him, and the Party shall have a Writ of *Rescous* against him, and so shall the Sheriff too.

Case against the Rescouser.

Action on the Case lies against the Party that rescoued, by the Party who had the Loss, and he shall not be forced to sue the Sheriff, for perhaps the Sheriff is dead, and then no Action lies against his Executors (*actio personalis moritur, &c.*) and if the Plaintiff recover, the Parties may plead it, if they be sued by the Sheriff, so as there is not any Danger of being doubly charged; so in *Hopping's Case*, 2 *Keb.* 340. Action on the Case lies against the Rescuer as well as the Sheriff. But as to the Case of *Myn and Caughton*, it is well reported and agreed by the Judges in *Hetly*, pag 94. by the Name of *Lyn and Cunningham*, which was full to the Point, and the Reasons in Respect to this, and other Cases of like Nature are weighty: I have set down as it is in the Book, with the Reasons of the Judges that differed in Opinion. *Cro. Car.* 109. *Myn and Caughton*, 2 *Keb.* 340. *Hopping's Case*.

What Damages the Rescouser shall answer.

The Defendant rescued *B. S.* out of the Bailiff's Hands, when the said *B. S.* was arrested by *Alias Capias* out of the King's Bench, which Writ is only in the Nature of a Plea in Trespass; the Party who rescued him shall answer

in this Action Damages for the Debt, which was 300 l. because by this Means the Defendant lost his Debt; but if the Sheriff or Bailiff in this Case had only suffered a negligent Escape, they should be charged only with the Damages in the same Plea as the Writ supposeth, and nothing for the Debt. *Lane's Rep. p. 70. Kent and Kelloway.*

Remedy against the Rescouer by Indictment, and for what Reason quash'd or reversed. Indictment.

Error was brought to reverse an Indictment Errors of Rescous and Riot, and the Errors assigned were: assigned.

1. There was a Warrant to Three *conjunctim & divisim* to arrest H. and Two of them arrest him, it ought to have been by One, or all Three, because it is a Ministerial Act. 14 H. 4. 34.

2. *Juratores pro Domino Rege presentant*, and do not say Twelve Jurors present, and peradventure but Eleven did present. *Trin. 2 Car. 1. Harrison and Erington.*

The Names of the Jurors ought to have been certified, for peradventure they were not *probi & legales homines*, but Villains and Outlaws. 15 H. 4. 41.

Note, An Indictment before Coroners, which *Per Sacramentum* found B. *felo de se*, was quash'd, because it did not appear it was *per Sacramentum proborum & legalium hominum*. omitted.

4. It is found that the Sheriff, by Virtue of a Writ directed to him, came, &c. and upon this what Rescous was made by H. &c. and it appears not what Manner of Writ it was, (*viz. Eleg. Capias,*

Sheriff
mistakes
the War-
rant.

pias, &c.) and if there were no Writ, there can be no *Rescous*; and albeit he had no Writ, yet if Execution were done by Virtue of another Writ, the Party may disobey it, (if he be not a Bailiff known) as if on *Hab' fac' seisinam* the Sheriff makes a Warrant as on a *Capias*. *Trin. 2 Car. 1. Harison and Ervington.*

Appear-
ance.

An Indictment for a *Rescous* returned against one in *B. R.* ought not to be quash'd, although it be erroneous, except the Person indicted for it do personally appear in Court. *Pract. Regist. Tit. Rescous.*

Indict-
ment not
to be un-
certain.

Indictment of *Rescous* ought to express the Place where, and the Time when the *Rescous*, or else it is ill for the Uncertainty. *Pract. Reg. Tit. Rescous.*

Return of Rescous.

Return
of Rescous
forbidden

By *Stat. W. 2. cap. 39.* a Return of *Rescous* is forbidden, for *redundat in dedecus Domini Regis*. The Sheriff may take the *Posse Comitatus post vel ante Queremoniam*, as well before as after Complaint made, and the Delinquents must be punished *Coram Rege* in the King's Bench. *Co. 2 Inst. 45.*

Where
Sheriff is
not fina-
ble, but
Action
lies a-
gainst him

Note, The Court never fines a Sheriff for the ill Return of a *Rescous*, because it is voluntary, but they allow Exceptions to quash it, because the Party cannot traverse it: But where he is compellable to make a Return, he is finable, but the Party shall have his Action on the Case. Yet in *Chambers's Case*, 2 *Keb.* 358. the Sheriff is finable for returning a *Rescous* on *Fi fac'*; but the Return is well enough as to the Party. 1 *Keb.* 878. *Burrough's Case.* 1 *Roll. Rep.* 319. *Proby and Lumley.*

Aliter on
Fi fac'.

Now

Now as to the ill Returns of *Rescous*, and the Exception to quash it; I shall briefly cite the Cases adjudged in our Books, for the more perfect Direction of such Returns hereafter to be made.

The Return of a *Rescous*, without mentioning the Place where it was made, is void. The Sheriff returns *Rescous* upon him at *Dale* in the County of *Bucks*, which was the County into which the Process was awarded. Exception was taken, because he saith not [*infra ballivam meam*:] But *non allocatur*; for if it be within the County, it cannot otherwise be taken, but to be within his Bailiwick. *Mo. 422.*

Upon a *Latitat* awarded, the Sheriff returns a *Rescous tali die*; but there is not any Place mentioned where the Arrest was made. It is a void Return. For *non constat*, whether the Arrest and *Rescous* were within the County and Jurisdiction of the Sheriff. *Yelverton pag. 51. Woolfrost's Case. Dyer 69. Dalt. 534.*

The Sheriff returned a *Rescous* against the Father and Son; against the Father for rescuing his Son, and against the Son for rescuing himself.

As to the Father, the Return was sufficient as to Time and Place: But that against the Son wanted such Certainty.

By *Dodderidge*, The Return is good: It shall be intended at the same Time that the Father rescued the Son; that the Son rescued himself, and the Word (*Et*) is a Conjunction Copulative, and couples both together.

Haughton contra. A Prisoner may be rescued by others, and he not know of it; and the *Rescous* may be at several Times. *2 Bulstr. 137.*

The Sheriff in his Return of *Rescous* said, That he was in *Custodia Ballivi Itinerantis*, and that a *Rescous* was made to his Bailiff Itinerant:

It is not good. *Aliter*, if it had been Bailiff of a Liberty. *March, Rep. p. 92.*

Quashed. *Rescous* quash'd, because it is *quod arrestavit* — without saying *in custodia sua habuit* — 1 *Siderfin* 332.

Aliter of The Sheriff ought not to say, He rescued him Bailiff of out of the Custody of his Bailiff, but out of the a Liberty. Custody of the Sheriff: But it is good if it were by the Bailiff of a Liberty, *vide Raym. 161.* But see after *e Custodia ballivi mei*, which is *veritas facti*. *Vide 1 Lev. 214. and 2 Lev. 26. alias 28.*

Rescous extra custodia, &c. Return of *Rescous extra custodiam*, without saying that he was in Custody; is ill.

Quashed. Return of a *Rescous* was not quashed for saying, *In Custodia* for *e Custodia*; but because he saith *Cepit & arrestavit*, and not *in Custodia habuit*, it was quashed; for an Arrest may be only by Word: 2 *Keb. 177.* The King against Claypoole; and p. 227. The King against Sympson.

E custodia ballivi mei veritas facti, &c. Exception was to the Return of a *Rescous*, because it was *e custodia ballivi mei*. *Sed non allocatur*; for there is *veritas legis & veritas facti*, and if either be alledged it is sufficient; therefore it is as good as if it had been *e Custodia mea*. But *Keeling* held it ill; because a Return must answer the Law, and the Difference has always been between a Sheriff's Bailiff, and a Bailiff of a Franchise. And according to the Opinion of *Keeling*, is *Dyer. 7 El. 241. 39 H. 6. 42. 2 Roll. Rep. 263, 354.*

Return ill for Repugnancy.

The Sheriff returned thus: *Virtute Brevis mihi direct' feci Warrant' A. B. &c. Ballivis meis qui virtute inde ceperunt the Defendant, et in Custodia mea habuerunt quousque such and such eum Rescusserunt ex Custodia Ballivorum meor'.* And *Holt* Chief Justice said, When Bailiffs have arrested the Party, he is in Fact and in Truth in their Custody. But in Law he is in Custody of the Sheriff, and a Return

turn either Way is good: But to say he was in the Custody of the Sheriff, and yet rescued out of the Custody of the Bailiffs is repugnant, and the Return was quashed. *Salk. 586.*

If the Sheriff return in *Banco* a Rescous made to his Bailiff errant by these Words, viz. *Virtute istius, brevis, &c. mandavi ballivo meo Itineranti, &c. qui mihi sic respondit, quod arrestavit, &c.* shewing the Year, Day and Place; and that a Rescous was made, &c. This Return is not good, because this Arrest is the proper Arrest of the Sheriff, and no Credit is to be given to the Bailiff errant. *Mich. 8 Jac. in Scaccario. Kent and Heltway's Case.*

But per Cur^a, such a Return in *Banco Regis* is good enough, because the Precedents of the Court are accordingly; and such Return by a Bailiff of a Franchise in *B. R.* is good.

Though it is said. 2 *Roll. Rep. 78.* the Sheriff ought to return Rescous made to him, and not to his Bailiff; yet in Truth the Force is made to his Bailiff, but it is according to the Different Course of the Courts.

Two Exceptions were taken to the Return of a Rescous:

1. *Feci Warrant*, but saith not *sub sigillo Officii*. Saith not *Non allocatur*, because he saith *feci Warrant*, *di-rect*, and it is not a Warrant unless it be *sub sigillo*.

2. It was not returned, That it was *extra custod* of the Sheriff, but of the Bailiffs. *Sed non allocatur*; for the Custody of the Bailiffs *Virtute istius, brevis, &c. mandavi ballivo meo Itineranti, &c.* of the Sheriff, is the Custody of the Sheriff. *Sir Thomas Jones Rep. 195. Penfold's Case.*

A Rescous was returned in this Manner by the Sheriff; (viz.) in the Recital of the Arrest he said, &c.

said, *Mandavi ballivo, &c. qui virtute predicti Warranti arrestavit, &c.* and after shews the *Rescous*.

In the Return he makes no Mention of his Warrant.

Exception was, He commands his Bailiffs to arrest, and saith, That by Virtue of the said Warrant they did arrest, &c. and makes no Mention of any Warrant, but of his Command to them. Had this been to a Bailiff of a Liberty, it had been good; but not to those which are Bailiffs Itinerant.

But, *per Cur'*, he cannot command a Bailiff of a Liberty, but by his Warrant.

The Clerk of the Crown said, the common Form is, *Feci quoddam Warrantum*; but to a Bailiff of a Liberty, it is *Mandavi*.

A General Warrant to a Bailiff of a Liberty (*viz.*) for all Arrests is good; but not to a Bailiff Itinerant, by *Haughton*.

Rescuer fined.

But by Sir *James Lee*, Chief Justice; though the common Form be *Feci quoddam Warrantum*, yet this tantamounts, for the Mandate of the Sheriff to the Bailiff, is the Bailiff's Warrant. However, a Rescuer as to this cannot take Advantage, but shall be fined to the King. 2 *Roll. Rep.* 263. And *Note*, the Fine for a Rescue was usually 4 Nobles on each Offender. See *Salk.* 586. 2 *Jon.* 198.

The Time and Place where the Warrant was made, not shewed.

The Sheriff returns a *Rescous*, and recites where a *Latitat* was to him directed, &c. he made his Warrant to the Bailiff who arrested *W.* and that *G.* made the *Rescous*. It was held to be good, though he doth not shew the Time and Place of the Warrant. 2 *Roll. Rep.* 255. *Webb* and *Withers*.

A Res-

A Rescous was returned in this Form by the Sheriff.

CE P I corpus prædict' A. & idem A. fuit in custodia mea virtute brevis prædict' quousque B. C. & D. Vi & armis (tali Die & Anno) in E. & F. ballivos meos insultum fecere vulneravere & male tractavere, & præd. A. de custodia mea adiunc & ibidem rescussere.

And two Exceptions were made:

1. He doth not shew any Warrant made to the Bailiff. *Per Cur'*, The Prisoner is alledged to be in custody of the Sheriff, and the Rescous to be from him, and therefore need not speak of the Warrant; and this that is spoken of the Bailiff is Surplufage.

2. The Rescous is not well returned, because the Battery is alledged to be *Vi & armis*. *Per Cur'*, This is Surplufage, and the Rescous is not returned to be *Vi & armis*. *Latch. p. 184.*

Quare, If a Rescous may be returned without *Vi & armis*.

But this Case is more truly reported by *Rolls*.

If a Sheriff return, That he by Force of a *Ca-pias* took the Body of J. S. & ipsum habuit in Custodia quousque J. D. & J. N. Vi & armis such a Day, insultum fecer' in W. S. & W. N. his Bailiffs, & prædict' J. S. adtunc & ibidem e custodia sua rescusser' & prædict' J. S. seipsum rescussit. This is not a good Return, because it doth not shew that the Bailiffs had any Authority to intermeddle; and to lay a Rescous without *Vi & armis*, is not good; and the *Vi & armis* goes to the first Clause only. *Pasch. 3 Car. 1. Wilcox's Case. 2 Roll. Abr. 457.*

The

Quashed
for not
saying his
Bailiff,
&c.

The Return of a *Rescous* was quashed for these Exceptions:

1. It is said, *Feci Warrantum meum Thoma Taylor*; and does not say, *Tho. Taylor* was his Bailiff.

2. He doth not say, for what Cause he made his Warrant: And so it appears not whether it was lawful or not. *Stile's Rep.* 159.

No Addition to
the Rescuers.
Commitment of
Rescuers.

In a *Cap. Utlagat.* before Judgment, the Sheriff returned, That *J. S.* and *J. N.* rescued the Party. It is good without Addition: For no Statute nor Book will compel the Sheriff to give Additions in this Case. And the Rescuers which were present were committed to the *Fleet*. *Winch. Rep.* p. 10.

Simulcum, &c.

If the Sheriff return, That the Party himself, *simulcum J. S. & J. N.* made the *Rescous*: It was said it was not good; because there is not any Averment that *J. S.* and *J. N.* rescued him.

Insensible
Return.

And if it had been that *J. S. simulcum N. rescusserunt A.* it is not good against *J. S.* because it is *rescusserunt*, which is insensible. *Mich.* 14 *Car.* 1. *B. R. Dalt.* 534.

Rescue
by several
returned.

Return of a *Rescous* was excepted to, because it is said, *quod ad tunc e custodia ballivi ceperunt & rescusserunt*; and doth not say, *& quilibet eorum rescussit. Sed non allocatur*: For it shall be intended all of them did it; and tho' their Fines are several, their Offence shall not be intended so. 2 *Keb.* 436. *Le Roy versus Suffield.*

Special
Bailiffs
are Strangers.

By *Stile's Pract. Reg.* 541. *Tit. Rescous*, the Sheriff cannot return a *Rescous* made upon a Special Bailiff, but it must be a known Bailiff, because Special Bailiffs are for the most Part Strangers to the People.

But

But *Vide Lit. Rep. p. 2.* Rescous was returned Upon a by a Sheriff upon Arrest by Special Bailiffs *hac* Special *vice* (scilicet) That Cooke and seven others made Warrant, Assault upon the Bailiffs, &c. and the Party arrested *cepit & abduxit*, where it should be *ceperunt* one only *& abduxerunt.* *Per Cur.* The Return is good a- named. gainst Cooke, and void against the rest; and Cooke (against whom the *Capias* issued) was admitted by his Attorney to make Fine, which was 6 s. 8 d. *Lit. Rep. p. 2.*

The Warrant was directed to two Persons which Arrest by were not known Bailiffs, and one of them arrested Special the Defendant at six of the Clock at Night in Ja- Bailiff at nuary, and shewed not his Warrant, nor told him 6 at at whose Suit, and thereupon he was rescued, *Et* and Res- *fi, &c.* Resolved, That he need not shew his War- cuethere- rant, &c. till the other obeyed and demanded it; on. and that the Arrest being at six at Night, the Door being open, was well enough. Also that for this Rescous, the Action was well maintainable against the Defendant by the Plaintiff, for he hath Loss, and cannot have his Action against the Sheriff.

A Bailiff of a Liberty hath Return of Writs, and Rescue therefore a Rescous made for him must be returned, from a to be out of his Hands. But a Rescous made for Bailiff of the Sheriff's Bailiffs, must be expressed to be out a Liberty, of the Hands of the Sheriff's Bailiff; for the Bailiff *&c.* is but the Sheriff's Servant. But as to this last, it is not Law. *Vide supra, Stile's Rep. 417.*

The Return being made by the Bailiffs of a *Sua* for Franchise, and saying *e custodia sua*, is not good, *mea.* unless he saith *mea.* 2 *Keb. 177. Le Roy versus Claypoole.*

The Sheriff made a Warrant *Ballivis suis*, to ar- *Ballivis* rest such a Man, and the Bailiff of the Liberty re- *suis & ret.* turns a Rescous; yet it is good. *Marsh. Rep. p. 25* by *Ball.* *Lib.*

Rescue
from the
Bailiff of
a Liberty,
&c.

R. and W. were returned by the Sheriff, to have made a Rescous upon such a Bailiff, to whom he directed his Warrant to execute his Writ. *Per Cur'*, This Return is insufficient, because it doth not appear that the Bailiff had *Retorna brevium*, which ought always to be mentioned on the Sheriff's Return. And this must be so, if he return it at the Return of a Liberty: But here in the principal Case he returns it in his own Name, wherefore it shall be intended it was his own Bailiff; and tho' he name him in his Return as Bailiff of a Liberty, yet that is but a void Addition. *Cro. El. 780. Lady Russel and Wood. Vide Stile 417. Dalt. 534.*

Upon
Sheriff's
Arrest
within a
Liberty.

Tho' the Sheriff arrests a Man within a Liberty in the same County of which he is Sheriff, and the Prisoner is rescued, yet the Rescous is unlawful, because the Arrest is good; and it is no Offence, unless it be to the Lord of the Liberty. *Yelv. p. 51. Winch's Case, cited in Woolfreston's Case.*

Return of
Rescous
on Mean
Process.

Return of a Rescous on mean Process was quashed, because it saith *ad Largum iuit quo voluit*, and not *ad Largum quo voluit ire permiser'*. 2 *Keb. 318 Le Roy versus Lisle.*

Forms of Returns of Rescous. *Vide Dalton 215, 216. New Ret. Brev. 94, 95, 372, 373, &c.*

Rescous returned by Bishop of Durham. *New Ret. Brev. 94, 95.*

Return inde per Ballivum jurat. *Id. 372.*

Aliter per Ballivum Itineran. Id. 373.

Aliter cum Schedul. 374, 380.

Aliter per Ballivum Hundred. Id. 375.

Aliter per Ballivum Libertat. with a Riot. Id. 381, &c.

Rescous.

Rescous.

Of Laying the Action, Declaration and Pleadings.

A Warrant was from the Sheriffs to the Bailiffs By Bailiff of the Liberty of *Pomfret*, who did execute it, and of a Liberty there was a Rescous: And the Bailiff may have the Liberty. Action against the Rescuers in his own Name; but he failed in proving it to be a Liberty, and was nonsuited, &c. And Note, he was put to it first to prove the Liberty by Records. *Foster and Legard's Case at York Assizes.*

B. brought a *Latitat tempore Eliz. versus E.* Arrest in who was served in the Time of King James, and one E. rescued himself, and the Rescue was returned King's by the Sheriff of *Essex*. *Per Cur'*, This is good; and Re- Time, for a *Latitat* is within the Statute of 1 Ed. 6. and Rescous in is not lost or abated by the Demise of the Queen: another. For it is not any original Writ, but is in the Nature of an Execution, grounded on a Record precedent, viz. upon a Bill of *Middlesex*, so that the *Latitat* issues upon a Suit depending; and the Ar- *Latitat*, rest was good, and so the Rescous. *Yelv. Everard* the Na- and *Blach.* ture of it.

In the Declaration, the Time of the Arrest must How to be shewed upon which the Rescous is supposed to declare be made; and it must be shewed, that the Party and shew *Rescoused* was in Custody of the Serjeant or She- the Time of the Ar- riff from whom he was rescued. *Stile's Rep.* 432. rest, &c. *Gough and Cann.*

The Plaintiff declares, Whereas one S. was in- That he debted to him by Bond in 300 l. and for Non-sued out payment he sued a *Latitat* out of the King's Bench a *Latitat*, directed to the Sheriff of, &c. to arrest him, returnable at such a Day, intending upon his Appearance, and Bail put in according to the Course of

of the Court, to declare against him, (and shews the Course and Custom of the Court, that he upon Appearance should put in good Bail, that if Judgment were had against him he should satisfy the Condemnation, or render his Body in Executi-

Writ delivered to the Sheriff of the King's Liberty of Newark to execute it; which Warrant was delivered to the L. Deputy of the

Lord Burleigh, *Ballivi Libertat' Domini Regis Wapentagii sui de Newark*; who by Force thereof arrested the said S. That the Defendant rescued

him out of the Custody of the said Deputy, and he escaped, &c. Errors moved in the Exchequer Chamber.

Errors. First, Because the Custom of the King's Bench is alledged to be, that if any one arrested comes *sub Custodia Vicecomit'*, he shall put in Bail, which is not so, for he shall be in *Custod' Marr'* and no Declaration can be against him *sub Custodia Vicecomitis*. But *non allocatur*, that which is alledged of the Court is idle.

Custom of the Court.

That he was rescued from the Deputy of the Bailiff of a Liberty, good. Secondly, It is said, he was rescued from the Deputy of the Bailiff; where it ought to have been from the Bailiff himself, or from the Sheriff: *Sed non allocat'*, for there is a Diversity in this Case, which is an Action on his Case, wherein he shall shew the Truth, as in *rei veritat'* it is, and not as it is upon the Returns of Rescues and Indictments, which say it is done to the Sheriff or Bailiff himself. *Cro. Jac. 241. Kert and Ellwis. Dalr. 535.* Like the Case of *Burgh* and *Apleton* Sheriff of *Essex*. *Lanes Rep. 70. Mesme Case.* In that Case it was declared, That the Bailiff of a Liberty arrested the Party, and delivered him to the Sheriff's Deputy, and that he rescued him from the Sheriff's Deputy.

Deputy. *Dyer* 244. And Judgment *pro Querente* in that Case, and in *Lane's Rep.* p. 70. *Burgh* and *Apleton's* Case, in the same Case saith, that the Course of the King's Bench is always so in Return of a *Rescous*, to be out of the Hands of the Deputy-Bailiff; notwithstanding *Dyer* 7 *El.* 241. And the Declaration was held good, that he sued an *Alias Capias*, without mentioning a *Latitat*, before this Arrest was made by the Deputy-Bailiff of *Newark*. But the main Question was, because it doth not appear, that the Bailiff had a Power in his Patent to make a Deputy-Bailiff.

The Action is brought in *Suffolk* against the Sheriff of *Suffolk*, for arresting the Defendant in the first Action upon a *Capias Utlagat'*, and suffering him to escape, and the Defendant in the first Action is named of *S.* in *Com' Norfolk*, and the Arrest is supposed *apud S. præd'*, so the Arrest is supposed in the County of *Norfolk*, and then it is *Tortious*, and there is not any Escape thereon. *Per Curiam*, it is an incurable Error. *Cro. Eliz. Eden* and *Floyd*.

In Action or Case on a *Rescous*, The Plaintiff declares, that *A.* was indebted to him by Obligation of 20 *l.* and that he sued a Writ against him directed to the Sheriff of *Cornwal*, to take *A.* and that the Sheriff 1 *Oct.* 6 *Car.* arrested him at *L.* in *Com' Cornub'* and after the Defendant at *Westminster*, the *præd'* 1 *die Octob.* rescued him out of the Custody of the Sheriff; and on *non culp'* Verdict and Judgment *vers. Quer.* he brought Error and assigned this for Error, for that it was impossible he should be arrested at *L.* and the same Day be rescued at *Westm'* (200 Miles distant), yet the Court will not intend it to be impossible. But however, see what Reasons the Plaintiff shall have

to assign Error on his own Declaration. 1 Roll's
Abr. 523. Kendal and Kendal.

Trespass. Trespass on Assault laid and tried in Somersetshire, the Defendant justified by Warrant to the Sheriff of Dorset, and that the Plaintiff endeavoured to rescue himself, and issue *de injuria sua propria*. Gold after Verdict prayed Judgment, because within the Words of 16 and 17 Car. 2. c. 8, there being three Judgments in the Point. *Wife and Adderley in C. B. Trin. 26 Car. 2. Croft and Winter, and Croft and Bays*: But the Court were not satisfied with these Judgments, and resolved that the Statute intended the Trial where the Cause of Action ariseth. But there was a *R. plead'*, because the Defendant traversed *absque hoc*, that he was Guilty *aliter vel alio modo*. The Reply was, he was Guilty *aliter & alio modo*, which was a wild Issue. 3 Keb. 552, 612. *Masters and Wood*.

Trial
shall be
where the
Cause of
Action
ariseth.

Pleading.

Diversity In Action on the Case on Escape upon Mean
between Process, Defendant pleads a *Rescous*, ever since 6
pleading Car. 1. it hath been held a good Plea. *Per Cur'*,
Rescous If it be returned, it is a good Plea, and it need not
in Case be averred in the Plea that it was returned. But
and Debt in Debt on Escape it is no Plea. 3 Keb. 513. *Hill*
on E- and *Montague Bailiff of West*.
scape.

If not guilty, may be pleaded to the Return. In Action on the Case for a *Rescous*, one may traverse, &c. but *Quare*, if Not guilty may be pleaded to the Sheriff's Return of a *Rescous*. 1 Keb. 258. *Rast. entr' 580. Le Roy versus Mayor of Hereford*.

Scire fac' to have Execution of a Judgment in *Onsci' fa'*
 Debt. Defendant pleads, That at another Time the ^{in Debt,}
 Plaintiff had sued Execution by *Capias ad satisfaci-* ^{Bar that}
end', and that he was taken thereupon. Plaintiff ^{he was}
 replies, True it is, he sued a *Ca. sa.* and the De- ^{formerly}
 fendant was taken thereupon, but he presently res- ^{a *Ca' Sa'*,}
 cued himself and escaped. Replication is good, as ^{&c.}
 there is no Cause for the Defendant to have *Audi-*
ta Querela when he is escaped and taken again,
 unless it be for a voluntary Permission by the Sher-
 riff; so there is not any Bar for the Plaintiff to have
 new Execution: And tho' it is no good Return on
 a *Ca. sa.* that the Defendant rescued himself, (for
 the Sheriff at his own Peril ought to have kept him)
 nor any Plea in Debt on Escape; yet the Party
 himself shall never take Advantage of his own *torti-*
ous Act. And *Scire fac'* after the Year is well main-
 tainable. *Cro. Car.* 240. 255. *Robinson* and *Cleyton*.

Venue. Verdict.

Action on the Case on *Rescous* is out of the ^{Altering}
 common Rules of the Court to alter the *Venue*; ^{*Venue.*}
 but it is in the Discretion of the Court on Circum-
 stances to alter it: As Action brought against a
 Bankrupt may be brought in the County, or here
 where the Commission is awarded.

Where a Man may lawfully rescue himself. ^{I Where a}
Keb. 346. ^{Man may}

There is a Difference between a Warrant of Re- ^{rescue}
 cord, and a Warrant or Authority in Law; for if a ^{himself.}
Capias be awarded to a Sheriff to arrest a Man for
 Felony, albeit the Party be innocent, yet cannot he
 make *Rescous*. But if the Sheriff will, by Authori-
 ty which the Law gives him, arrest any Man for
 Felony who is not guilty, he may rescue himself.
Coke 1 *Inst.* 161. a.

Y

Note,

What
Fine.

The Wife
escaped
out of
Execu-
tion.

Note, Four Nobles Fine is a General Fine imposed for a Rescuer. *Sir Thomas Jones*, p. 198.

In Debt *sur Escape versus Vic'*. Plaintiff declares, That J. S. and his Wife were in Execution, and that she escaped. On *Nil debet*, special Verdict found, that the Baron was in Execution, and that he escaped; and further, that the Wife was not taken in Execution, (being for Debt contracted before Coverture:) Yet Judgment *pro Quer.* the Verdict was not in the Whole pursuant to the Declaration, because they found the Husband escaped. 1 *Siderfin* 5. *Roberts* and his Wife against *Herbert*.

Found by
the Jury
upon a
Rescous.

In Action on the Case upon a *Rescous* and Escape: The Jury find the Debt due to the Plaintiff, the Prosecuting the *Latitat* for this Cause, the Making the Warrant hereupon to the Sheriff, &c. *Cro. Jac.* 485. *Hodges* and *Mark*.

Rescuer
discharg-
ed.

On Affi-
davits.

In the Case of a *Rescuer*, there are two Ways of Proceeding for his Discharge. 1. If the Rescue is returned to the Philazer, and Process of Outlawry issues, and the Rescuer is brought into Court, he shall not be discharged on Affidavits: But where upon the Return of a Rescue an Attachment is granted, and the Party examined on Interrogatories there, upon answering them he shall be discharged. *Salk.* 586.

Attach-
ment not
granted
on Affida-
vits.

Upon an Affidavit of a Rescue on Mesne Process an Attachment was prayed against the Rescuers, but denied: For *per Holt*, The Rescue must be returned on the Writ, and the Motion and Attachment founded upon that; but it is never granted on Affidavits. *Ib.* 586.

C H A P. XXI.

Of Escapes. Some Maxims and Diversities premised. Escapes, as to Mean Process, and as to Execution. What shall be or amount to an Escape of a Prisoner out of Execution, or not. Of Escapes in respect of the Old and New Sheriff, and of the Prisoners being delivered over. What Thing or Act shall excuse an Escape, or in what Cases the Sheriff or Gaoler shall not be answerable for an Escape. Of erroneous Process. Where the Escape of one shall not be the Discharge of the other; and where the other shall have Audita Querela, or not. Actions of Debt, or on the Case, by the Party against the Sheriff for an Escape, and who shall have such Action. To whom it shall be said an Escape, or not, at Election.

Of Escapes

Escape is where one that is arrested, or imprisoned on the Arrest, comes to his Liberty before he is delivered by Order of Law.

But before I treat of Escapes, it will be very advantageous, for the better Understanding thereof, to set down some few Diversities, which will help to settle one's Judgment in Reading and Considering the Cases ensuing.

Diversities.

Negli-
gent and
Volun-
tary.

1. Between a Negligent, and a Voluntary or Permissive Escape. A Permissive or Voluntary Escape is by the Assent, Privity and Knowledge of the Sheriff, Gaoler, &c. *Vide postea*, where the Prisoner may be retaken, or not.

Mean
Process
and Exe-
cution.

2. Between an Escape on Mean Process, and on Execution. In Escape upon the Arrest by the same Process; as a *Cap' ad respondend'*, the Writ ought to surmise *ad largum ire permittit, & non comparuit ad diem*; because the Party was bailable, and the Sheriff might suffer him to go at large. *Aliter*, if the Arrest be upon Execution; as a *Cap' ad satisfac'*, there *permittit ire ad largum* is good enough. *Noy 72. Sheriff of Nottingham's Case. Vide infra.*

Debt and
Felony.

3. Between an Escape for Debt, and for Felony or Treason.

By Sheriff
and Res-
coufers.

4. Between an Escape by a Sheriff or Bailiff, and an Escape caused by Rescoufers. A Rescoufer shall be charged with the Debt. The Sheriff or Bailiff for a Negligent Escape shall be charged with the Damages only in the same Plea as the Writ supposeth, and not with the Debt. *Lane's Rep. p. 70.*

In Fact
and in
Law.

5. Between an Escape in Fact, and an Escape in Law: As where a Man may be in Custody without actual Arrest.

6. Between

6. Between Error in the Proceedings, and a Nulli-Error
ty of the Record, and how the Sheriff shall take and Nul-
Advantage of either. lity.

7. Between an Escape in the Life of the Testa-Testator
tor, and an Escape in the Time of the Exe-and Exe-
cutor, upon Execution in the Time of the ^{cutor.}
Testator.

Note, If Judgment be reversed before Action of Judg-
Debt brought for an Escape out of Execution, ment re-
the Action is gone. 1 *Sand.* 38. *Jones and Pope.* reversed.
8 *Rep.* 142. *Dr. Drury's Case.*

Note, It was said by *Twisden*, in 16 *Car.* 2. *B. R.* Occasion
' The Occasion of so much Liberty in the of Liber-
' *Marshalsea* is, that the Marshal is not charge-ty in the
' able but by Bill, which must bear *Teste* in *Marshal-*
' Term-time; and so in the former Term the ^{sea.}
' Party is not escaped: And by the First Day
' of the later Term the Prisoner generally is to
' return to Prison, and so no Remedy for the
' Party. 1 *Keb.* 794.

Here also it may be further observed from
Dalt. of Sh. 17.

That in *Westby's Case*, 3 *Co. Rep.* it was resolved, If a She-
That if a Sheriff hath in his Custody divers riff dieth
Persons in Execution, and dieth in the Time in his
of his Office, and after a New Sheriff is made: Office, the
here the New Sheriff at his Peril ought to take New She-
Notice of all the Executions which are against riff must
any Person which he finds in the Gaol, but take Spe-
this is by Reason of the Necessity, for that tial No-
there is no Person to make Delivery of them Executi-
ons,

The Office and Duty of Sheriffs, &c.

to him, or to give him Notice; and besides, the New Sheriff may take Notice himself of all Executions, they being upon Record.

And of all
other Pri-
soners.

Also in the former Case, the Sheriff (it seemeth) is to take Notice of all other Prisoners in the Gaol, and of the Causes of their Commitment; and so the new Sheriff (upon the Death of the Old Sheriff, during the Time of his Office) is chargeable without either Delivery of the Prisoners, or Notice of the Causes of their Commitment.

And for
the Writs.

And so it seemeth for the Delivery of the Writs, upon the Death of the Old Sheriff during the Time of his Office, the New Sheriff is to take Notice of all other Writs, (and of the Contents thereof) which shall be in the Hands of his Predecessor, or his Under-Sheriff.

Escape in
the Inter-
val.

He may
be taken
again into
Execu-
tion.

Also in the afore recited Case, it was resolved, That if a Sheriff die in the Time of his Office, and that before another is made Sheriff, there if a Prisoner who is in Execution shall break the Gaol and escape, and go his Way, yet this is no Escape; for that by the Death of the Sheriff, all his Prisoners were in the Custody of the Law, until a New Sheriff be made; and the Prisoner may be taken again in Execution at any Time after wheresoever he shall be found.

If in Pri-
son at the
time such
new Sho-
riff is
made, he
is charge-
able,

But if such Prisoners shall be in the Gaol at the Time such New Sheriff is made, there the New Sheriff (as soon as he is appointed by the King; or at least as soon as he hath received his Patent) seemeth to be chargeable presently with them, without any Delivery or Notice made or given to him of the said Prisoners,
or

or of the Causes of their Commitment; and if Prisoners shall after get out of the Gaol, this is an Escape; yet if it be without the Consent of the New Sheriff, or his Gaoler, then they also may be taken again at any Time after.

Again, *Dalt.* 138, 139.

If the Sheriff or any of his Officers do suffer any Prisoner being in Execution, to get at Liberty before the Debt be satisfied, the Creditor may either have his Action of Debt against the Sheriff, and so shall recover his Debt, or else the Creditor may have an Action of the Case against the Sheriff.

Voluntary suffering one in Execution on to escape.

But if the Prisoner do escape of his own Wrong against the Will of the Officer, altho' he escape and get out of Sight, or into any other County where the Sheriff or Officer hath no Authority; yet if fresh Suit be made, and he be taken again upon the fresh Suit, he shall be said to be still in Execution. 3 Co. 52.

Escape against the Sheriff's Will.

And upon such an Escape against Will, if he be taken again upon the fresh Suit, before any Action brought for the Escape; it shall be adjudged no Escape.

Taken again before Action for the Escape.

And if the Action be brought for such an Escape, yet the Sheriff may take the Escaper again, and detain him in Custody till he hath made his Agreement with the Sheriff: Or else he may have an Action of the Case against him; and in these Cases he shall not be relieved, because the Escape was of his own Wrong, and without the Consent of the Sheriff, or his Officer.

Taken again after an Action brought.

Q. The late Act for taking up Escapers by a Judge's Warrant.

Of Escapes as to Mean Procefs.

In Custody with-
out a
Arrest, an
Action
for the
Escape
shall be
good.

When a Man is in Custody of the Sheriff by Process of Law, and another Writ is delivered to him to take him, presently in the Judgment of Law, he is in Custody without actual Arrest, *quia Lex non præcipit inutilia*; as *A.* recovered in Debt; Defendant was outlawed, and after the Year the Plaintiff procures a *Capias Utlagat'*, and delivers it to the Sheriff of *London*; after the Serjeant arrests the Defendant to answer *J. S.* before the Sheriff, the Plaintiff delivers the Sheriff's Warrant to the Serjeant (who had the Defendant in his House) to arrest the Defendant; the Serjeant refuseth, and after the Sheriff suffers him to go at large: Plaintiff brought Action against the Sheriff, supposing he had arrested him, and Defendant pleaded *non permisit*, &c. 5 *Rep. Frost's Case.*

Prisoner not to be hurried away.

By *Windham* in *Benskin's Case*, by Law the Bailiffs ought not to hurry away any immediately to Prison, but he may call any other Persons in Aid, and so may commit the Prisoner to them. 1 *Keb.* 483. *Benskin's Case.*

Escape by Assent, &c.

If by Assent the Sheriff suffer one to go at large, no Action lies for the Escape. *Aliter* if without Consent, and he may be taken again on fresh Suit. 3 *Co.* 52. *Dalt.* 139.

Of Escape out of Execution.

What shall be said an Escape of a Prisoner out of Execution for Debt, or not.

If a Man in Execution be suffered to go at large Prisoner for a Time out of the County, and to return again in Execution, and this upon Bail or Mainprize, yet this is an Escape, for he ought to be kept in *arcta custodia*. So if he be suffered to go at large to any Place within the County, and to return again; so if he be suffered to go at large within the same Town where the Prison is, it is an Escape, tho' he return within his Time. *Plowd. 36. b. Platt's Case. 3 Rep. 44. Boynton's Case. Hob. p. 173. Earl of Essex.*

The Case was *A.* recovered upon a Plaint in London against *B.* and had him in Execution in Ludgate. *A.* died intestate. *B.* was permitted by the Keeper of Ludgate to go at large into Southwark with *J. S.* Servant of the Keeper, and by the Command of the Keeper. The Administrator of *A.* brought Debt against the Sheriff of London upon the Escape. *Per Cur'.* It was an Escape. He that waited upon him into Surrey could not be Officer to the Sheriff of London, and so he had no Keeper: For the Power of a Sheriff does not extend beyond his own County, unless in Special Cases. And the Party might have Action of *Falsi Imprisonment* against him, tho' the *Baston* or Servant waited on him there, being voluntary. *Dyer 166. accord.*

If the Sheriff removes his Prisoner out of the County without being commanded, it is an Escape, and if he remove Prisoners for Ease and Delight in the same County, it is an Escape: As a Prisoner went to a Bear-baiting with his Gaoler in the same

same County, and it was adjudged an Escape; so if the Sheriff permit his Prisoner to go to work, it is an Escape. *Hetly p. 34*

To walk
in Town
without a
Hab. Corp.

May re-
move his
Gaol.

Caution
upon an
Hab. Corp.

To suffer a Prisoner to walk in the Town, tho' with a Keeper, is an Escape, unless it be upon a *Habeas Corpus* from a Court of Justice. *Hob. p. 202.* If the *Habeas Corpus* bears *Teste* in the End of one Term returnable in another, this Writ will not warrant the Prisoner to go at large in the Vacation. *Hob. ibid. Balden and Temple's Case;* for though the Sheriff may remove his Gaol from one Place to another within his Bailiwick, yet he must keep it and his Prisoners within it, and not suffer them to go at Large out of the Prison, tho' he himself be attending on them, without an *Habeas Corpus* from some Court of Justice. And let Keepers of Prisons beware when they receive an *Habeas Corp.* from the *Chancery*, or any other Court bearing *Teste* in the End of a Term to have the Body of one in Execution in the Court the next Term, that they do not by Colour of such Writs suffer the Party to go at Large all the mean Time, (as it is sometimes practiced) for the Writ warrants no more than that he be brought out of Prison only for that Purpose, and only for so much Time as in Judgment of Law shall be convenient and necessary for the Execution of the Writ, and no more, which in *privilegiis odiosis* must ever be strict.

Hab. Corp. By *Hale* in *Lutterel* and *Mosedell's Case*, an in the *Aff.* *Hab. Corpus* out of that Court to which the Party *size-time* is a Prisoner doth justify the Gaoler in Affize-time, but otherwise if it be out of any other Court; but out of which soever, if the Authority of the Writ be executed either in Time or Place at the Pleasure of the Gaoler or Prisoner, it is an Escape, as being carried a Month before

the

the Time, and staying a Month after; also the *Habeas Corpus* being at a Place and Day certain, it is no Pretence of Stay at any other Places, or *ultra*, No Pre- to search Writings, or to speak with Witnesses, tence of and *immediate* is a convenient Time without wil- Delay. ful Delay: So is *Mod. Rep.* 116. tho' the Sheriff be not bound to bring the Prisoner the direct Way, yet he ought not to carry him round about a great No Way, for the Accommodation of the Party; if he round- do it, it is an Escape. 3 *Keb.* 305. *Lutterell* and about *Mosedell's Case*, and *Mod. Rep.* 116. *Mosedell's Way*. *Case.*

But upon this Point of the Prisoners being suf- Diversity fered to go at Large, there is a Diversity to be well heeded. And that is,

Between one in Execution within the Franchise Of one in or County where the common Gaol is, where the Executi- Office of Sheriff or Bailiff extends, for there if the on within Sheriff, &c. assent, that one in Execution shall go the Fran- chise or out for a Time, altho' he return by the Time, or County. if he suffer him to get at Large by Bail or *Baston*, it is an Escape. But when the Sheriff, &c. is When to commanded by Writ to have the Body at *West-* have him *minster*, he may be a Keeper of him in another at *West-* County, as in the Case of *Bennet* and *Halfey*. *minster.* *Mo.* — 3 *Rep.* 44. *Boyston's Case.* *Vide Dyer*

275. Upon the Sheriff's suffering one to go at By Con- Large for a Time, by the Consent and Agreement sent of of the Plaintiff, and the Prisoner returneth again. the Plain- tiff. *Dalt.* 139.

The Plaintiff was taken in Execution by the Upon Sheriff of *B.* and by an *Habeas Corpus* he was *Hab. Corp.* brought to *Smithfield* by the Gaoler of *B.* and *ad recipi-* there at eight a Clock at Night the Prisoner went *end' Pri-* into *Southwark*, and none with him, and there went soner continued all Night, and the next Morning he re- from turned to *Smithfield* to his Keeper, and there con- *Smithfield* tinued to *South-* *wark.*

tinued with him till the Return of the Writ, at which Day he brought him to the Lord Chief Justice's Chamber at *Serjeants Inn*, and he returned his Writ, and the Chief Justice committed him to the *Marshalsea*, and it was adjudged to be no Escape in the Sheriff. So in *Burton* and *Andrew's* Case. *Mo. Rep. Bennet and Halfey*.

Where
the Effect
of the
Writ is
perform-
ed.

For the Effect of the Writ is performed to have him there at the Day, and the Writ does not command him to bring him the usual Way, but to have his Body at the Day, and so if one be Sheriff of two Counties, and had arrested two by two several *Capias's* in two Counties, he may bring one into the other County to have them both at *Westminster*, and may bring them the surest Way.

Hab. Corp.
ad Testifi-
cand.

If a Gaoler on an *Habeas Corpus ad Testificandum* bring one whom he had in Execution to be a Witness; by *Twisden*, it is an Escape, and so has been adjudged. In *Roll* his Time, the Court was moved for an *Habeas Corpus* for a Prisoner in the King's Bench, that he might be a Witness in a Cause in *Derbyshire* at the *Affizes*, but it was denied; but he said he knew it granted for one to be a Witness at a Trial at *Guildhall*, but at the Charges and Peril of the Party, for whom he was to be a Witness if he escape. 14 *Car. 1. B. R.*

Denied
into the
Country.

Allowed
to *Guild-*
hall.

Allowed
into *Mid-*
dlesex.

And in 24 *Car. 2. B. R. Adam's* Case, the Court granted an *Habeas Corpus* for a Prisoner in the *Marshalsea* to testify in a Cause in *Middlesex*. But *Hale* Chief Justice said, He would never grant it in his Chamber, being but a private Person, and the Party may escape, which would be remediless. *Sinderfin p. 13. Fitz-Jeffreys*.

The King
cannot
license
one to go
at Large.

If one be in Execution in the *Fleet*, or other Place, at the Suit of the King, or of a common Person, and the Warden or Gaoler (by the Command of the Lord Chancellor or Treasurer) suffer him to go into the Country with a Keeper to ga-

ther

ther Money, the sooner to pay the King; and he goes accordingly, and returns to Prison again: Yet this is an Escape as to the Common Person; for the King himself cannot license a Man to go so at Large. *Dyer 12 & 13 Eliz. 297.* See for several of these. *Dalt. ch. 29.*

If one be in Execution at the Suit of the King At the in the *Fleet*, the Warden may suffer him to go to Suit of his Counsel with his Keeper: But not so in the the King Case of a common Person. *Savill's Rep. p. 29.* in the *Fleet.*

A Man is in Execution for Debt, and a Woman Woman being Warden of the *Fleet* marries the Prisoner: Warden This is an Escape; for that he cannot be his own marries Prisoner, nor a Prisoner to his Wife. Prisoner.

So if the Sheriff or Gaoler marry a Woman that *simile of* is in Execution for Debt. Sheriff.

Sir *Gervas Clifton's* Case, cited in *Leon. 237.* in Suffering *Offley* and *Saltington's* Case, was, He being She-one to see riff suffered one in Execution, and in his Custody, a Play. to go and see a Play; and the same was adjudged an Escape, and the Party could not be in Execution again.

This Case was referred by the King to the Judge-*Hab. Corp.* es. *Trin. 12 Car. 1.* Whether in Regard of the in Regard Plague, *Habeas Corpora* may be granted for the of the Prisoners in Execution in the Prisons of the King, Plague. *Bench* and *Fleet*, upon Judgments in the *Common Bench* and *Exchequer*; and it was certified by them to the Lord Keeper, That if upon *Habeas Corpus* granted, the Gaoler suffers the Prisoners to go at Large with a Keeper or Baston, that this is an Escape, and that no *Habeas Corpus* ought to be by Not allowed. the Law for this Purpose, which the King well approved of.

And in *primo Caroli* the Prisoners in the *Fleet* petitioned the Parliament, that they may have *Habeas Corpora* in the Vacation, in Respect of the great

great Plague in London; but the Parliament would not assent to it, because against the Law.

Executi- A *Capias ad satisfaciend'* is served upon one
on served who is a Prisoner for Felony, and indicted and
upon one arraigned, and found guilty, and afterwards e-
who is scapes. Debt lies against the Sheriff, for the Exe-
Prisoner cution was well served upon him; and altho' his
for Fel- Body was at the Queen's Pleasure, yet he shall not
ny and take Advantage of his own Tort, but he shall an-
then an swer the Suit or Execution of a common Person.
Escape. Cro. El. 165, 517. 1 Leon. 87, 236. Ognel and
 Paston.

Sheriff The Sheriff had one in Custody on a *Ca. sa*
liable for which issued *post diem & annum*, without a *Scire*
Escapes *fa'* to warrant it, and let him escape; and 'twas
on erro- held the Sheriff was liable notwithstanding the
neous Process was erroneous, and that he should not take
Process. Advantage of the Error: But otherwise had it
 been on a *Capias ad respondend'* tested in Trinity
 Term, and returnable in *Hillary*, because such
 Process must be returnable from Term to Term.
Shirley versus Wright. Trin. 1. Annæ. 1 Salk.
273. Vide 5 Mod. 413. 3 Mod. 324, 325.

Dis- Debt for 200 *l.* on Bond conditioned to pay
charge by 100 *l.* and for want of Bail the Defendant was
a Court committed to the Marshal, and he applied to the
not Justices of Peace of *Surrey*, and procured a Dis-
having charge on the Act for Relief of Insolvent Debtors.
Jurisdic- The Plaintiff obtained an Escape-Warrant, upon
tion is which he was taken; and on a Motion to be dis-
void, and charged, the Court held this was an Escape: For
an E- he being a Prisoner indebted, and also charged in a-
scape. bove 100 *l.* Debt and Damages, the Justices had
 no Authority for what they did, and therefore
 their Discharge was illegal and void. *Mich. 4*
Annæ. 1 Salk 273.

The Sheriff delivers the Prisoner upon a void Delivery
Audita Querela: This is no Escape, and there the Prisoner may be taken again in Execution. *Mo. 344. n. 479. Collin's Case.* upon a void *Audita Querela* is no Escape.

But if a *Scire facias* had in it the Words of *Audita querela*, it is against Law, and it is an Escape if the Sheriff deliver the Prisoner upon it. *1 Roll. Rep. 383.*

A forged Warrant of Attorney for Satisfaction is delivered into the Office where one is in Execution, and the Marshal lets him go: It is an Escape, unless the Attorney's Hand were to it, or a *Supersedeas* delivered. *1 Keb. 873. Collet's Case.* Marshal delivers one on a forged Warrant for Satisfaction.

Note, The Marshal is bound to take Notice of all Commitments in Court. *Vide 6 Mod. 133.* But in other Cases he is not chargeable in Escape till Notice of the Commitment. See the Case of *Watson and Sutton. Mich. 13 W. 3. 1 Salk. 272, &c.*

If a Man recover against *Baron and Feme*, and Debt lies take both in Execution, and after the Wife is suffered to escape; tho' the Husband continue in Prison, yet Debt lies upon this Escape against the Sheriff, in which all the Debt shall be recovered; for this was the Debt of the Wife, and she is as fully in Execution as the Husband: And Debt lies on it as well as Action on the Case. So if the *Feme* be only taken in Execution. *2 Bulstr. 320. 1 Roll. Abr. 810. Dr. Sutloff and Sir George Reynel. 3 Bulstr. 150. 1 Roll. Rep. 204, 205. Cro. Jac. 657. Whiting and Sir George Reynel.*

Where

Where the Sheriff shall be so chargeable with a Prisoner, as to Escapes; where the Action will lie, and in what Cases not.

In Re-
spect of
the Entry
on the
Roll of
Committi-
tur.

The Entry of a *Committitur* upon the Roll shall not charge the Marshal for Escape, (if there be any after) for then it should be in the Power of every Attorney to charge the Marshal. A *Committitur* was ruled to be vacated, to the Intent the Plaintiff should be at Liberty to take out what Execution he will. But if the Party after such *Committitur* entred be in the Marshal's Custody, and then escape, the Marshal shall be charged for Escape. *Siderfin* 220. *Conny* and *Jacob*.

Caution
upon a
Committi-
tur.

Therefore let the Student beware of the Opinion in *Keble* (1 *Keb.* 775) in this Case of *Conny's*, where he tells you, the Entry of a *Committitur* alone is sufficient to charge the Marshal, as in Execution for Escape of a Prisoner, without actual Proof of his being in Execution. But the better Opinion is in 1 *Keb.* 375. in *Pettyware* and *Hamson's* Case.

The mo-
dern
Course.

The Course has been always of late, That in Case *Committitur* be entred on Record, yet it must be proved he was in Custody since that Time; because it is the usual Course to enter a *Committitur* against every Defendant, tho' he be upon Bail.

Marshal.

Wherefore the Court ordered the Marshal to shew, whether one were in Custody or not. See 1 *Salk.* 272, That the Marshal is not chargeable till Notice of the Commitment, &c.

Ca. sa de-
livered,
and Party
taken af-
ter on a
Cap. Ut-
lagat.

Capias ad satisfaciend' was delivered to the Sheriff *versus J. S.* and after the Sheriff did arrest *J. S.* by Force of a *Capias Utlagat'*, and then the Party in the *Capias* came to the Sheriff, and prayed that the Party may remain in Execution for his Debt also: And the Sheriff suffers him to go at

at Large, and upon both Writs returned *Non est inventus*. *Per Cur.* The Sheriff was not bound in Discharge of the Plaintiff in Escape; and it is not like where one is in the *Fleet* for Execution; there, if other Condemnations in other Courts be notified to the Warden of the *Fleet*, he shall be chargeable with them all. 1 *Leon.* 253.

Scire facias lies not on the Escape of a Bail, if Upon E. no *Scire fac'* issued out against him; for the Sureties ought not to be taken in Execution presently. The Condition of Recognizance of Sureties is, That they bring in the Defendant if he be condemned, or to pay the Debt. Now if no *Scire fac'* issues out against him, the Surety being taken cannot plead the Release of the Plaintiff, or the Death of the Defendant in his Discharge, as he might do upon *Scire facias*. 2 *Leon.* p. 29. *Devered and Ratcliff.*

Of Escapes as to the Old and New Sheriffs, and delivering over.

The Sheriffs of *London* by Indenture deliver or Escape in ver *J. S.* (in Execution at the Suit of *A.* and *B.* Law upon severally) and only mention the Execution of *A.* not delivering over one *J. S.* escapes; *B.* brought Debt against the ancient Sheriffs on this Escape. It well lies: For he cannot be in Custody of the new Sheriffs for this Execution, because they were not charged with this Execution, and the Fault was in the old Sheriffs that they omitted this Execution of the Plaintiff in their Indenture; and the Escape began *eo instante* that the ancient Sheriff delivered the Prisoner to the new, for then they cease to have the Custody of him, and although he remain in the Rules of the Prison, it is an Escape in Law. 3 *Rep. Westby's Case.*

Upon one returned at the Day returned *Languidus*, &c. and afterwards in *exitu ab officio suo* delivered him to the new Sheriff, as a Prisoner for this Cause, and the new Sheriff suffered him to go at Large. This is an Escape in the new Sheriff, and an Action of the Case lies against him; and tho' the other Sheriff returned *Languidus*, &c. yet this is not material to the Plaintiff; he remains always in Prison. *Cro. Jac. 380. King versus Sir Eusebius Andrews.*

New Sheriff not chargeable before Delivery. If the Sheriff takes a Man in Execution, and after a new Sheriff is made; and before the other Sheriff delivers over, the Party who was in Execution escapes. The new Sheriff is not chargeable for this Escape, but the old Sheriff; for the new Sheriff is not chargeable with any Prisoner before Delivery to him. *2 Roll. Abr. 557. Sheriff Skinner's Case.*

One let go and came again into Gaol. One in Execution is willingly let go out of Prison by the Gaoler, and then came into the Gaol again; then a new Sheriff is, and then he makes Escape.

By *Hobart*, on a Trial at *Guildhall*, the new Sheriff cannot be chargeable with him, nor answerable for him, as in Execution; for the Execution by such Escape was utterly discharged. Neither can two Sheriffs be answerable, *simul & semel*, for two Escapes, out of one and the same Execution at the same Time. *Hob. 202. Sheriff of Essex's Case.*

New Sheriff not answerable where the second Taking is not lawful. One taken in Execution on *Ca. sa.* by the Under-Sheriff, he took Money of him for the Execution and let him go: Then the Sheriff dies and a new Sheriff is, and the same Under-Sheriff; and a new *Ca. sa.* is taken out against the Party, upon which he was arrested again, and escaped. By

By *Hobart*, the new Sheriff is not answerable, the second Taking in Execution being never lawful. *Hob. p. 202.*

If the old Sheriff keep any Prisoner after he is discharged of his Office, it is an Escape. 2 *Leon.* 54. *Smallman* and *Lane.*

If one taken upon a *Cap'* escape, and the Sheriff die, and a new Sheriff be made for the Remainder of the Year; then the same Person is taken by another *Cap'* for the same Cause and Escape: This will not charge the new Sheriff. *Hob. p. 202.* The like.

If the Prisoner walks abroad, and returns in the Returns Time of one Sheriff, and escapes in the Time of another Sheriff; this is no Escape in the Time of the second Sheriff. *Hob. 232. Vide antea.* escapes.

A. was taken in Execution in the Time of the New Sheriff, and then escaped; and afterwards in the Time of the new Sheriff the Plaintiff again sued a *Scire facias* against *A.* upon the said Judgment: Upon which Execution was awarded by Default, and thereupon issued a *Cap. ad sat.* against *A.* by which he was taken and escaped. *Per Cur'*, The new Sheriff shall be charged; for tho' *A.* was in Execution, which was determined by Escape in the Time of the old Sheriff, yet when a new Execution was awarded against him upon his Default in the *Scire fac'*, the same shall bind the Sheriff, out of whose Custody he escaped. 1 *Leon. pag.* 3. *Gibbert* and Sir *George Hart.* be charged in Escape upon a new Execution.

What Thing or Act shall excuse an Escape, or in what Cases the Sheriff or Gaoler shall not be answerable for an Escape.

Note, The Prisoner committed is in Custody both of the Sheriff and the Gaoler; and if he be committed to the Sheriff, and the Gaoler suffer him

to escape, the Gaoler is punishable. For the Sheriff shall answer civilly for the Faults of the Gaoler, but not criminally. 1 *Salk.* 272.

Note, also a precedent Assent of the Sheriff will excuse an Escape, but not a subsequent. 1 *Salk.* 271.

On Re-
turn of
Rescous
on Mean
Process,
the She-
riff shall
be ex-
cused in
Action of
Escape.

If the Sheriff arrest a Man upon a *Latitat* or other mean Process, and the Prisoner is rescued from him before he be carried to Prison, and the Sheriff returns the Rescous against the Rescuers; this shall excuse the Sheriff in *Action sur Case* upon Escape, because he is not bound, neither is it convenient for him to bring a *Posse Comitatus* with him to serve every mean Process. But if the Sheriff bring him to the Gaol, and after he is rescued out of Prison, and he returns the Rescous, yet this shall not excuse the Sheriff, for he ought to keep his Gaol at his Peril. But if the Sheriff takes a Man in Execution, as on a *Capias ad satisfaciend.* and he is rescued before he brings him to Prison, tho' he returns the Rescous, yet this shall not excuse him; for that he is to take a *Posse Comitatus*. and the Party cannot have a new Execution. *Proby and Lumly.*



Now let us see whether, and how far, erroneous Process shall excuse the Sheriff.

Chargeable, tho' Process be erroneous.

Tho' the Process of the Court be erroneous, yet the Sheriff shall be chargeable on Escapes; as if first *Capias* be by a wrong Name, and the *Testat.* by a right Name; so if one who is in Execution by a *Capias ad satisfaciend.* on a Recognizance, tho' the *Capias* is erroneously awarded, yet the Sheriff is chargeable. Yet note, That a *Capias ad satisfaciend.* lies on a Recognizance, as in *Ognell* and *Paston's Case.* 1 *Leon.* 2 *Blust.* 256. *Keyfar* and *Tirrel.*

So of a *Capias* awarded without a *Sci. fac. Cro.*
Eliz. 576, *Conyer's Case. Cro. Eliz.* 188. *Bushe's*
Case.

So that he is not to take Advantage of Error in Diversify
 the Proceedings; otherwise it is where he can alledge if he can
 a Nullity in the Record; and if the Court award a alledge
Capias where it lies not to the Sheriff, by Force of Nullity
 which he takes the Party, and then suffers him to in the
 escape, he shall be charged, for he is not to dis- Record.
 pute the Authority of the Court.

Another Difference is, where the Court hath Diversi-
 Jurisdiction of the Cause and where not: Where ty, where
 the Court hath Jurisdiction, and doth misaward the Court
 Process, this is but Error; but if the Court hath has Juris-
 no Jurisdiction, and doth misaward Process, there diction of
 all is void, and the Sheriff may shew this in Dis- the Cause,
 charge of himself: As if a *Formedon* be commen- and where
 ced originally in *B. R.* or an *Appeal* in the *Com-* not.
mon Bench, all is void, and no Action of Escape
 lies against the Sheriff; as *Kingston upon Hull* is a
 limited Jurisdiction, and they hold Plea of a Bond
 made out of their Jurisdiction, and thereupon a
Capias was awarded against the Obligor, who be-
 ing arrested on it, escapes; no Action lies against
 the Sheriff; and this is the Difference in the Case
 of the *Marshalsea*. But this is more fully reported
 in *Roll's Abridg.* 2 *Blust.* 62. *Weaver and Clifford,*
Ognell and Paston's Case. 8 *Rep.* 243. *Dr. Dru-*
ry's Case.

Action on the Case is brought in *B. R.* against Jurisdi-
 the Officer in an inferior Court upon Escape; if Action to
 the Plaintiff declare that he brought an Action a-be al-
 against *J. S.* in the said inferior Court (as *Kingston* ledged,
 upon *Hull*) on an Obligation made at *Halifax* in
Com' Ebor', and does not alledge this to be within
 the Jurisdiction of the said inferior Court, and up-
 on this Judgment was given and Execution granted,
 and the Defendant took him in Execution and

suffered him to escape, and upon this he brings his Action. 1 Roll. Abridg. 809. Richardson and Bernard.

Declaration. This Declaration is not sufficient to charge the Defendant, because it is not alledged, the Obligation was made within the Jurisdiction of the Court; for although the Action be transitory, yet this inferior Court had a limited Jurisdiction of Things arising within the Jurisdiction; and the Proceedings there were *coram non Judice*, and utterly void, of which the Officer shall take Advantage in this Action for the Escape. See 1 Lev. 50, 69, 96, 104, &c.

Erroneous Process. Upon the Whole, we may see that the Case of Warren and Clifford is misreported in Telv. p. 42. it is said, It was held by three Judges, that the Action did not lie, because he was not a Prisoner by the Course of Law, for he was in Execution upon a *Capias ad satisfaciend'* on a Recognizance, which lay not, but on a *Sci. fac'*; and therefore saith that Book, he being taken by *Cap' ad satisfaciend'*, he is not a Prisoner by Course of Law, for the Law has not ordained any such Means to arrest him; and he being in Custody without Warrant, it is no Escape. But this is a double Mistake, for a *Capias ad satisfaciend'* has been adjudged to lie on a Recognizance, and if it did not, yet it is but erroneous Process, of which the Sheriff shall not take Advantage. *Vide antea.*

Erroneous Process. In Case upon Escape against the Sheriff of Lancaster, for suffering one *M. W.* to escape out of Execution; and shews a Recovery against him in *B. R.* and *Cap' ad satisfaciend'* and a *Non est Inveni'* returned; and a *Testatum* that he concealed himself in the County of Lancaster, and a Writ was awarded to the Chancellor of the County Palatine of Lancaster, that he should command the Sheriff to take the said *I. M. ad satisfaciend'*, &c. *ita quod* the said Chancellor should have him, &c. and that the Chancellor commanded the Sheriff that

that he would take the said *M. ita quod* the Sheriff should have him *coram Justiciariis*, &c. and the Defendant being Sheriff did thereupon arrest him, &c. Error was brought, because the Writ directed by the Chancellor to the Sheriff was not warranted by the Writ directed to him, for it varies from the Command, for it ought to have been that the Sheriff should have the Body before the Chancellor, *ita quod* that he should have him before the Justices. *Sed non allocat'*; for though there be Error in the Process, the Sheriff shall not take any Advantage thereof, but having suffered him to escape he is responsible to the Party. *Cro. Jac.* 288. *Burton and Eyre.*

So the Sheriff shall not take Advantage of Error in the Process, as in *B R.* the Plaintiff had Judgment to recover more than was due to him ^{take Advantage.} *2 Sand. p. 100. Jaques and Lockart. Vide 1 Salk.* 273. *5 Mod.* 413.

To this agrees *Fitz. Tit. Bar. pl. 253.* Debt ^{By a Gaoler.} was brought against a Gaoler for Escape, who said, the Sheriff did not deliver him lawfully to him: But *per Cur'*, he is not to meddle whether the Sheriff delivered him lawfully to him. So *21 Ed.* 4. 23. *b.* Action against a Gaoler for suffering one condemned to go at large; it is no Plea to say, that the Process was discontinued before the Judgment given, for he was a Stranger to it. *Dyer* 66. 15. *4 Rep.* 84. *Southcott's Case.*

If the Prison be broken by the King's Enemies, this shall excuse the Sheriff from Escape, for the Gaoler could not resist them, and he can have no Remedy over; but if a Prison be broken by Rebels and Traitors within the Realm, so as the Prisoners escape, this shall not excuse the Sheriff, the Gaoler may have his Remedy over. ^{broken by the King's Enemies shall excuse the Sheriff, &c.}

Escape
by sudden
Fire shall
excuse the
Sheriff.

If the Prisoners escape by sudden Fire, this shall excuse the Sheriff, for it is the Act of God. *Dyer pl. 66.*

*Audita
Querela.*

Where the Escape of one shall be a Discharge of the other, or not; and where the other shall have Audita Querela, or not, vide supra.

Two
bound
one in
Executi-
on and
suffered
to escape.

Executi-
on with
Satisfac-
tion.

Two ta-
ken, one
escapes
after Re-
covery a-
gainst the
Sheriff,
the other
shall have
*Audita
Querela.*

Two are bound jointly and severally, and one is in Execution, and the Gaoler suffers him to escape voluntarily, this cannot be pleaded by the other, for it is no Discharge of the Debt, and by Consequence the Action lies against the other; now where two are bound jointly and severally, one was condemned and taken in Execution, and after the other was sued, condemned and taken, the first escapes, the other shall not have *Audita Querela*, because it must be an Execution with Satisfaction: And though the Plaintiff may have Debt on Escape against the Sheriff, yet there ought to be Satisfaction in Fact before *Audita Querela* lies, and perhaps the Sheriff is worth nothing. And if the Defendants were sued by one Writ and several *Præcipes*, although the Entry should be *Quod unica fiat Executio*, this is intended to be with Satisfaction, for he shall have both their Bodies. But if two are taken in Execution for Debt, and one escapes, Debt lies against the Sheriff; and after the Debt recovered against the Sheriff, or against the other, the other which remains in Execution shall have *Audita Querela* to be relieved; but the Body taken in Execution is no Satisfaction for the Debt. *6 Rep. 86. Blomfield's Case. Cro. Jac. 351. Pendavis's Case. Cro. Eliz. 478. 2 Bulstr. 321.*

And so is *Hobart* express; The Escape of one joint or several Obligor, where both be in Execution,

cution, shall not discharge the other. *Hobart*,
pag. 2, 59, 60.

And therefore the Escape of one in Execution, where two are bound in a Bond, is no Plea to the Bond; and though he escaped by the voluntary Permission of the Sheriff, so as the Plaintiff is entituled to an Action against the Sheriff, yet that shall not deprive him of his Remedy against the other Obligor: But if he had pleaded, That the Sheriff suffered him to go at large by the Licence of the Plaintiff, it might have been pleaded in Discharge. *Cro. Car. 75. Whitacre and Hankinson.*

G and A. were jointly bound to T. in a Bond of 7000 l. The Obligee takes several Actions, and had two several Judgments, and sued both to Outlawry, and A. was taken upon a *Cap' Utlagat'* by the Sheriff of D. who voluntarily suffered him to escape. T. brought Debt against the Sheriff, and recovered and received Satisfaction, and proceeded to take A. but A. brought *Audita Querela*: And he failed in his Declaration, because the Satisfaction made by the Plaintiff to the Sheriff was not specially pleaded, (*viz.*) Time and Place where it was made; for it is issuable; and it may be made after the *Audita Querela* purchased. But if T. had recovered only Damages in Action of Case for the Escape, the Plaintiff should have had no *Audita Querela*; but here he recovered his Original Debt in Action of Debt, grounded upon the Escape. *Mod. Rep. 170. Alford and Tornell.*

Upon the Escape of any one upon a Joint Judgment and Execution, the Debt lieth for the Whole; especially if they be in several Prisons, as 5 *Rep. 87. Blomfield's Case*. Though the Duty wholly survived by the Death of the Party escaped before any Action brought, and though

Escape of one in Execution on no Plea to the Bond, tho' it was by Permission.

The Satisfaction ought to be specially shewn in *Audita Querela*.

Difference between Action of Debt and Case.

Any one on Joint Execution escapes, Debt lies for the Whole.

though the Executor of the Party dead is discharged.

Death of one.

But *quare* if the Death of one before the Action brought, doth discharge the Escape: By *Hale* and *Rainsford* it doth not: By *Wild* and *Twisden* it doth. 3 *Keb.* 305. *Lutterel* and *Mosedale*.

Against the Sheriff, &c.

Of Actions on the Case or Debt, by the Party against the Sheriff, &c. for Escape.

Where to be brought.

If a Suit be in the Admiralty for a Matter arising *super altum Mare*, and upon this the Defendant is in Execution and escapes, the Plaintiff may have an Action for this Escape in *B. R.*

Case lies at Common Law.

Action on the Case for Escape lies at Common Law, but no Action of Debt lay at Common Law; but the Party was driven to his Special Action on the Case, which Action was grounded on a *Trespass* or *Tort*, and not upon any Contract in Deed or Law. 1 *Roll. Abr.* 536. *Brightwright* and *Taylor*.

Debt lies by Statute Law.

But now Action of Debt lies against the Sheriff or Gaoler for an Escape upon the Statute of *W. 2. cap. 11.* And 1 *Rich. 2. c. 12.* gave Debt against the Warden of the *Fleet*; and so it is in Equity against the Marshal: And though the Statute limits the Action to be brought by Writ of Debt, which is by Original; yet a Bill of Debt lies by the Equity of these Statutes. And forasmuch as this Statute gives Remedy by Debt, it gives Damages also: And this Act doth extend to *Feme Coverts*, and Keepers of Gaols for Escape of Prisoners in Execution. 1 *Leon. 17. Cro. Jac. 658.*

A. levies

A. levies a Plaintiff in the Sheriff's Court of London against *B.* who was in Custody on a former Plaintiff by *C.* and then *B.* escapes (*i. e.* out of the Sheriff's Counter). *A.* may have an Action of Escape against the Sheriffs of London. *Trin. 5 Anna. 1 Salk. 273.*

Now we will consider Actions for Escape.

On { Mean Process,
and
Execution.

On Mean Process.

It is said, 1 *Roll. Rep. 389, 440.* Action on the Case lies not for Escape on Arrest in mean Process; but upon Execution it doth.

But in 1 *Roll's Abridg. 99.* If a Man be arrested on mean Process at the Suit of *J. S.* and he escape, *J. S.* shall have a Special Action against the Sheriff on this Escape. 1 *Roll. Abr. 99.* May Action.

If a Man sue a *Latitat*, to the Intent to declare against the Defendant after Arrest in *Custod' Debt.* *Maresc'* in Action of *Debt*, and the Sheriff arrests him, and suffers him to escape, an Action lies against the Sheriff shewing this Special Matter, and he shall recover his Damages, having Regard to the Loss of his Debt. 1 *Roll. Abr. 537.*

And so is the Bailiff of *Newcastle's Case.* One Escape brought an Action against *J. S.* before the Mayor, Bailiffs, and Stewards of *N.* where the Bailiffs are the Gaolers of the Town-Prison, and *J. S.* is committed to the Bailiffs on mean Process for want of Bail, and they let him at Large before Judgment of Bail, and Execution, and after the Plaintiff recovers against him. The Plaintiff may have a Special Action against the Bailiff on a *Franchise.*

on against the Bailiffs for the Escape; for by it he is deprived of the speedy Means to have him in Execution after the Judgment. 1 Roll, Abr. 99. The Bailiffs of Newcastle's Case.

On Execution.

Alias Capias; or Case. If the Sheriff suffers one taken by him in Execution to escape, the Party at whose Suit he was taken in Execution may have an *Alias Capias* against the Party that escaped, to take him again in Execution, or an Action on the Case against the Sheriff. *Pract. Reg.* 304.

Action lies, tho' the Writ be not returned. If the Sheriff takes one by *Capias ad Satisfaciend'* in Debt, if he after permits him to go at Large, and returns not the Writ, yet Debt lies on this Escape; for there is a Record of which the Party shall take Advantage, though the Writ be not returned. *Cro. Eliz.* p. 16. Clifton's Case.

Escape on *Cap. Utlag.* Action on the Case, upon Escape of one brought in Execution by Force of a *Cap' Utlagat'*, is *tam pro dom' Rege quam pro seipso*; and the Party shall have all in Damages.

By *Qui tam.* An Action on the Case, *Tam pro dom' Rege quam pro seipso* was brought, for that he had a *Capias Utlagat'* after Judgment against J. S. and delivered it to the Sheriff of D. to execute it, who seeing J. S. and being desired to execute it, would not do it, but suffered him to go at Large, and afterwards the said Sheriff returned *Non est inventus. Per Cur'*, The Action is well brought, and the King is to have the Benefit thereof as well as the Party. And in his Declaration he need not cite the whole Record, but begin at the Judgment *quod cum recuperasset*, &c. for it is but a Conveyance to the Action, and it is not necessary to shew the whole Record; and it sufficeth to begin at that which is the Cause of Action. *Cro. Jac.*

Declaration.
Quod cum recuperasset, &c.

§32. *Parkhurst and Powell. Cro. Eliz. 877.*
Eden and Floyd. Cro. Jac. 360. Barret and
Winchcomb.

Who shall have an Action of Debt or Case upon Debt on
Escape, or to whom it shall be said an Escape, or Escape.
not, at Election.

And this is to be considered in the Case of a
Capias Utlagat', or a *Capias pro fine*; or where
 one shall be said to be in Execution without Prayer
 of the Party, and where not.

If a *Cap. ad Satisfac.* issue upon a Judgment in Escape on
 Action of Debt, and the Sheriff return *Non est Cap. Ut-*
inventus, and thereupon he is outlawed; and af- *lagat.*
 terwards a *Capias Utlagat'* issues out against him, Yet the
 upon which he is taken and imprisoned, and after Party
 is permitted to go at Large; the Party who reco- may have
 vered shall have Action of Debt upon this Escape Debt.
 against the Sheriff; for he was in Execution against
 him also, because he cannot have a new *Capias*
ad Satisfaciend'. And if he escape, although he Where
 was taken at the King's Suit, yet the Party had one taken
 such Interest in the Body, that he shall have Acti- on *Capias*
 on of Escape against the Sheriff; and before the shall be
 Plaintiff's Prayer to have him in Execution; he is in Exe-
 in Execution at his Election. So that if the She- cution at
 riff suffer him to go at Large before the Plaintiff of the
 hath determined his Election, it is an Escape a- Party
 gainst the Plaintiff, if he will, and an Action of without
 Debt lies. *Yelv. p. 20. 1 Roll. Abridgm. 810. 5* Prayer.
Rep. Garnon's Case.

A. recovers in Debt vers. D. in Banco Commu- Recove-
 ni, and sues a *Capias ad Satisfac.* and an *Ex. post* ry in B.C.
 cap. and outlaws the Defendant who brought Error Error in
 in B. R. and Judgment affirmed, and within the B. R.
 Year a *Cap. Utlagat.* is awarded, and the Defen- Cap. Ut-
 dant taken, and the Sheriff suffers him to escape lag.
 be-Escape.

before the Return of the Writ; Action lies against the Sheriff. The Defendant here being taken by *Cap. Utlagat.* out of the *King's Bench*, shall be in Execution for the Plaintiff presently after the Arrest, if he will, although he was never brought into Court, nor the Court committed him in Execution for the Party. 5 Rep. *Garnon's Case*.

As to a *Capias pro fine*:

On *Cap. pro fine*, he shall be in Execution of the Suit of the Party. *Note*, In all Cases when the Plaintiff may have a *Capias ad Satisfaciend'*, and the Defendant is taken by *Capias pro fine*, he shall be in Execution for the Plaintiff, if he will, without Prayer: As a *Capias pro fine* on Recovery in *Assumpsit*, and also a *Cap. ad Satisfac.* returnable the same Term at one and the same Return; and as to the *Capias pro fine*, the Sheriff returns *Cepi corpus*; and as to the *Cap. ad Satisfaciend'*, *Non est inventus*. If the Sheriff in such Cases takes the Party by *Capias pro fine*, now upon this Taking he is in Execution for the Party; and if the Sheriff let him go at Large, he shall answer for the Escape. 1 Leon. 51. *Hadson and Leigh*.

Cap. pro fine for denying his Deed. So if a Man be taken by a *Cap. pro fine* for denying his Deed in the Action of *Debt*, and is suffered to go at Large, he who recovers shall have *Debt* against the Sheriff; for the *Capias* is *ad respondend' tam nobis quam parti*. 7 H. 4. 4.

Recovery on Forger of false Deeds. So in Recovery on Forger of false Deeds, if the Defendant be imprisoned for the Fine at the Prayer of the King's Attorney, if he be suffered to go at Large before Satisfaction to the Plaintiff, he may charge him for the Escape, because he is in Execution to the Party upon the *Prisal* at his Election. For he ought to be in Execution at the Suit of the Party, before Suit to the King, because the Suit of the Party is the Original; and the

the Fine but accessory, because of the Suit. 7 H.
6. 6. b.

But if a Man be taken by *Capias pro fine* for Where no
the King, where no *Capias* lies in the Original, *Capias*
(as in *Assize* with Force, &c.) and suffered to e- lies in the
scape before Prayer of the Party to be in Execution Original,
for his Damages, the Party shall not have Escape he shall
against the Sheriff, because he would not be in Ex- Executi-
ecution for him before Prayer. on before
Prayer of
the Party.

CHAP.

C H A P. XXII.

Action for Escape by Executors or Administrators, where it lies, or not. Against whom Action of Escape lies. Where Execution shall be after Execution on Escape; and where it shall not be a Discharge of Execution, but that he may be retaken again. Of laying the Action, and Manner of Declaration in this Action. Where the Sheriff shall have his Action against the Prisoner that escapes; and how to declare.

Action of Escape by Executors or Administrators and how to be brought.

That an Executor on mean Process may not have an Escape.

*Semble e-
contra.*

IT is made a Question in *Jones 173.* and *Latch. 67.* *Lemason and Dixon's Case*, Whether an Executor shall have an Action on the Case against the Sheriff for an Escape in the Time of the Testator on mean Process? But the better Opinion seems to be, The Executor cannot have any Remedy; the Escape being in the Time of the Testator, it is a personal Wrong to the Party, & *moritur cum Persona.* *Latch. 67.* *Jones 173.*

But on the other Side it was said by *Dodderidge*, The Executor shall have this Action, and that it is within the Equity of the Statute of 4 *Ed. 3.* for it is a Wrong, tho' upon mean Process, and the *Tort* continues as to the Executor; for every Thing which makes to the Hindrance of the Execution of a Will, is a Wrong to him, and the Performance of Wills is much favoured in Law. And if this Action would not lie, it would be a mischievous Case; for as soon as the Creditor dies;

dies, the Gaoler may suffer the Prisoner to escape, because none may have Action against him.

Two Judges were against Two.

Whitlock's Diversity was, This personal *Tort* may Diversity be considered in two Respects; as a Crime punishable, and that is gone; or as a *Tort* to the Party, and then it is but reasonable that the Executor should have Remedy.

But it is agreed by all, according to *Fitzh. N. B.* That it 121. That if it were upon Escape after Judg- well lies ment, that the Action would lie by the Executor; after therefore *quare* as to *Wade's Case*. 2 *Keb.* 616. Judg- ment. The Executor moved for a *Scire facias* against the Defendant, escaped out of Execution in the Time of the Testator, and that the *Committitur* then entred may be vacated. *Per Cur'*, albeit the Party or the Gaoler on negligent Escape, or the Party on wilful Escape, may take him again, yet No new Procefs after Com- mittitur. not by a new Procefs or *Capias* after a *Com- mittitur*; nor can the Executors have any Remedy.

But *Stile's Rep. p. 32.* *Boomer* and *Payt*, is po-Debt by sive, That the Administrator may have Action Admini- of Debt against the Sheriff for the Escape of a strator. Prisoner, suffered in the Time of the Intestate. But this was in the Case of Execution.

So that the Difference seems to be where the Diversity. Escape is on mean Procefs, and where it is out of Execution.

Another Difference is betwixt an Escape in the Diversity Life of the Testator, and an Escape in the Time of between the Executor upon Execution in the Time of the Escape in the Time of the Testator. And it is agreed for Law, That if a of the Prisoner escapes in the Time of the Executor, the Testator, and the Executor may have Action of Debt.

A a

But Time of the Executor.

It must be brought by Executor in the *Detinet*.

But the Question is in Sir George Reynell and *Langcastel's Case*; and it is adjudged, That it ought to be in the *Detinet* only, for it is grounded on the former Judgment: And as an Action of Debt on the first Judgment shall be in the *Detinet*, so here; and the Difference was taken, Where the Action is grounded upon Privy of Contract, it ought to be in the *Detinet*. *Aliter*, when grounded upon a *Tort*.

So is the same Case, *Hob. 272.* by the Name of *Langcastel* and *Sidley*: If it were in the *Debet* and *Detinet*, the Plaintiff should recover for his own Use.

So it is in *Stile's Rep. 32.* *Martin* and *Hendley*, and 2 *Roll. Rep. 132.*

So Executor brings Debt upon Escape of one who was Bail in the Recognizance with, &c. to his Testator, it must be in the *Detinet*. *Lane's Rep. p. 80.* *Carew's Case.*

No Costs upon Nonsuit.

Note, In Debt for Escape, brought by the Executor; if he be nonsuit, he shall not pay Costs. 1 *Roll. Rep. 63.*

Cafe and Recovery as Executor, upon a Judgment given as Administrator.

The Plaintiff brings Action on the Cafe as Executor against the Sheriff (Defendant) for Escape, and had Judgment given him *per Nomen* of Executor. This Judgment pass'd by *Non sum Informatus*. Error was brought, because the first Judgment was given for him as Administrator; and this in Action on the Escape, and the Judgment on it was *per Nomen* of Executor.

Dodderidge put the Case.

Administrator covers in Escape.

The Administrator hath one in Execution for Debt, the Sheriff suffers him to escape; he brought his

his Action of *Debt* against the Sheriff for this Escape, and recovers; and after all, he finds a Will And afterwards by which he himself was made Executor. The Recovery shall now be good, and this Money recovered against the Sheriff shall be Assets in his Hands, and no *Audita Querela* in this Case lies against the Sheriff. And Crook of the same Opinion.

Haughton contra. If the first Executor dies intestate, his Administrator shall not have an Action of *Debt* against the Sheriff for this Escape; no more shall the Executor here in the principal Case have his Action against the Sheriff for the Escape of him that was in Execution at the Suit of an Administrator. The Executor here hath no Privilege to sue Execution upon this Judgment, because the *Scire fac'* depends on the Satisfaction, and to this he is not privy. The Court being divided, it was compounded. 3 *Bulstr.* 112. *Slingsby* and *Lambert.* *Cro. Jac.* 394. 1 *Roll. Rep.* 276. *Godbolt* 262. *mesme* Case. See after.

Action on the Case lies by Commissioners of Bankruptcy, for suffering one to escape who was committed by them, because he refused to be examined. 1 *Roll. Rep.* 47. *Barnes* and *Cary.* Action lies by Commissioners of Bankrupts.

Against whom an Action for Escape lies.

If the Under-Sheriff takes one in Execution, and suffers him to escape; Action of *Debt* lies against the Sheriff himself. Against the Sheriff.

But there is a Case cited in *Marsh* and *Astrey's* Case, 1 *Leon.* 146, The Under-Sheriff suffered a Prisoner to escape, and the Action was brought against the Under-Sheriff: For (saith the Book) it may be the Sheriff himself had not Notice of the

The Office and Duty of Sheriffs, &c.

Matter: (*And I conceive it is no Matter whether he had or not, he having Security from his Under-Sheriff*); and the Writ was delivered to the Under-Sheriff, and he took a Fee for it.

Where
Action
lies a-
gainst the
Under-
Sheriff or
not.

But this seems not to be Law: The Sheriff is the Person in Court alone to answer all Misdemeanors of Under-Sheriffs, or Bailiffs. As the Under-Sheriff lets one go that is arrested upon a *Latitat*, and returns *Non est inventus*; no Action lies against the Under-Sheriff: But the Sheriff shall not be imprisoned nor indicted for the Act of the Under-Sheriff. *Latch. p. 187. Laycock's Case.*

Yet *quære* of the principal Case. *Vide supra sub Tit. Under-Sheriffs.*

Action a-
gainst the
Bailiff of
a Fran-
chise, and
not a-
gainst the
Sheriff.

Cap' ad satisfaciend' is awarded to the Sheriff of *Berkshire* to arrest *J. S.* who was then in the Custody of the Mayor and Burgesses of *Windsor*, and he awarded a Warrant to the Mayor, &c. to take him, who did so, and after let him escape. Action of *Debt* for this Escape lies against them, not against the Sheriff.

And the like Law of a Bailiff of a Franchise.

Not a-
gainst the
Execu-
tors of
Sheriffs
or Gaol-
ers.

Action of *Debt* is maintainable against a Gaoler or Sheriff for Escape out of Execution: But it doth not lie against his Executors or Administrators; *vide supra*, yet with this Difference. *Dyer 271, 322.*

Diffe-
rence be-
tween a
Tort and
levying
Money.

Where the Sheriff is chargeable in his Life-time for a personal *Tort* or *Misfeasance*, there his Person is only chargeable, & *Actio moritur cum Persona*: But where he is chargeable for levying Money on a *Fieri fac'*, and not paying it over, there if he dies, his Executors are chargeable: It is a Duty. *Cro. Car. 539. Perkinson and Cullyford.*

A Pri-

A Prisoner taken on mean Process upon Plaint Against a before the Sheriff in London, is in Custody of a Serjeant Serjeant, and escapes, the Action shall be brought ^{in London.} against the Serjeant in this Case. *Siderfin. p. 318.*

Action upon the Case against the Defendants be-How if ing Sheriff of London, on mean Process, and after one of the Issue and Trial by *Nisi prius*, and before the Day Sheriffs in Banco, one of them dies; tho' they are reputed dies. one Officer, yet they are two distinct Persons, and the Suit shall proceed against the other. *Hard. 161. Harris versus Phillips and Briggs.*

Where Execution shall be after Execution upon Escape, or where an Escape shall not be a Discharge of Execution, but that he may be taken again.

Note, If the Party negligently escape, the Party By Negligent and the Sheriff may take him again; but if voluntarily, then only the Party may take him Voluntary again, but not the Sheriff; but if the Sheriff let ry. him go by the Consent of the Plaintiff, then neither By Consent of Plaintiff can take him. 2 Keb. 206. *Alenson and Butler.* But see the late Scape-Act.

But tho' the Party or Gaoler on negligent E-Not by scape, or the Party on wilful Escape may take him new Process again, yet not by a new Process or *Capias* after a *Committitur.* 2 Keb. 616. *Wade's Case. Vide antea.*

If one in Execution on *Ca. sa.* escape of his own. Upon a Wrong, yet the Plaintiff cannot have other Execu-*Ca. sa.* tion. *Hob. p. 6.*

If a Man taken in Execution by a *Capias* be put In Case of in Prison, and after escapes, and after the Sheriff Sheriffs dies, a new *Capias* lies against him, otherwise the Death. Plaintiff would be without Remedy. But if a Man

In Case of Man be in Prison, and the Marshal die, and then
 Marshal's the Prisoner escapes, there is no Remedy but to
 Death. take him again; for if after the Death of the old
 Sheriff, and before another is made Sheriff, a Pri-
 soner go at large, this is no Escape, for he is in
 Custody of the Law, and may be retaken in Exe-
 cution at any Time. *Hob. p. 60. 41 Aff. 15 Mod.*
Rep. 14. 3 Rep. Westbie's Case.

New Ex- On voluntary Escape the Party doth not lose his
 ecution. Interest, but may take him again; and if the Sheriff
 die, he may have a new Execution, if he will.

Plea of So the Plaintiff Executor brought a *Sci fac'* on a
 permitt Judgment in Debt for the Testator against the De-
 ire ad fendant, *Quare Execution' habere non debet*, De-
 Largum fendant pleads he was taken in Execution *per Ca.*
 how con- *Sa.* upon this Judgment, and committed to the
 strued. *Fleet*, and that the Warden permitted him *ire ad*
Largum. Plaintiff demurs, and Judgment given
pro Querente; and he may have new Execution a-
 gainst the Defendant, who escapes out of Prison,
 by three Justices, *contra Vaughan*. And *Allanfon*
 and *Butler* is full to the Point. *Sir Thomas Jones*
p. 21. Allen and Winter.

Negligen- Second Point, *Whether permitt ire ad Larg.* shall
 ter. be implied *negligenter* or *voluntarie*, and it seems it
 is not voluntary, because the Plea shall be most
 strongly taken against the Pleader.

Where If *A.* be taken on Execution at the Suit of *B.*
 the Party and a voluntary Escape by the Assent of the She-
 has Ele- riff, and after the Sheriff retakes him and keeps him
 ction to in Prison, he shall be in Execution to *B.* because
 charge tho' *B.* may bring an Action against the Sheriff on
 the Priso- this voluntary Escape, yet this is at his Election;
 ner re- for the Party in Execution of his own Wrong shall
 taken, or not put *B.* to his Action against the Sheriff against
 the She- his Will, and it may be that the Sheriff is not able
 riff. to make him Recompence. 10 *Car. B. Trevillian*
 and

and the Lord *Roberts's Case*. *Siderfin. p. 350.*
Allanson and Butler.

So it is said, tho' the Gaoler be liable to an Action of Trespass for the Retaking, yet the Prisoner is in Execution; and the Reason given is, *The Body is a Pledge, and the Execution must be effectual.* 3 *Keb.* 453, 463. *James and Pierce.*

Voluntary Escape suffered only to gain Fees, ought not to be countenanced, nor is no Plea in Bar, that the Party was intended to return to Prison again at his Day; and the Plaintiff has an Interest, which is not discharged by the Escape. But my Lord *Hobart* on a Trial at *Guildhall* in the Sheriff of *Essex's Case*, was of another Opinion: The Case was; The Prisoner having been in Execution, was willingly let go out of Prison by the Gaoler, and then came into the Gaol again, and so remained in the Gaol till the Time of another Sheriff, and then escaped, and an Action of Debt was brought against the Sheriff, and he directed the Jury, that the Sheriff was not answerable to this Action; for when he was suffered by the Gaoler voluntarily to go abroad, the Execution was utterly discharged, so as he could not lawfully be taken again, nor adjudged in Execution by Law, tho' the Party would yield himself to it, or the Creditor should allow it. 2 *Leon. p.* 162, 169.

If a Prisoner in Execution escape with the Permission of the Gaoler, the Execution is utterly gone and extinguished, and the Plaintiff shall never resort to him that Escapes, but shall hold himself to the Gaoler for his Remedy. *Aliter* if he escape voluntarily, or of his own Wrong, *prout supra.* But the Law is now held otherwise against *Ridgway's Case*, *Dr. Drury's Case*, and the *Earl of Essex's Case*: But 'tis otherwise in *Case of a Rescous.* *Hob. p. 202.* *Sheriff of Essex's Case.* 2 *Leon.* 117, 162. *Phillips and Stone.*

Bar that
he was
formerly
taken in
Execu-
tion.

Repl. by
Rescous
and E-
scape.

New Ex-
ecution
upon
Rescous.

Fresh
Suit.

In *Sci' fac'* to have Execution on a Judgment in Debt, Defendant pleads, That at another Time the Plaintiff had sued Execution by *Capias ad satisfaciend'*; and the Defendant was taken in Execution. Plaintiff replies, That true it is, he sued a *Capias ad satisfaciend'*, and the Defendant was taken thereupon, but he presently rescued himself and escaped. *Per Cur'*, the Replication is good, and it is no Reason the Defendant should take Advantage of his own Wrong; though it is no good Return upon a *Capias ad satisfaciend'*, that the Defendant rescued himself, nor any Plea in Debt on Escape; and the Plaintiff may have as well his Remedy against the Party as against the Sheriff, and the Party hath Liberty to begin again *de novo* by Action on the Judgment, or against the Sheriff. *Cro. Jac. 240. Robinson and Clayton. 1 Keb. 660.*

If a Man upon a *Capias ad satisfaciend'* be taken in Execution, and after rescues himself from the Sheriff, and escapes, the Plaintiff may have a new *Capias* against him, and take him again, the first Writ not being returned or filed, nor any Record made of the Award, and this on a *Sci' fac'* after the Year, because he shall not take Advantage of his own Wrong, and so he may have *Elegit* or any other Writ: And so it is if the Sheriff had returned the Writ and *Rescous*, the Plaintiff may have a new *Capias* against him. *1 Roll. Abr. 904. Mounson and Clayton, and Radford and Hopkins.*

If one in Execution escape, and the Sheriff makes *fresh Pursuit* after him, and takes him again, although it be a long Time after, yet he shall be said to be in Execution again, because he shall not take Advantage in his own Wrong. *3 Rep. Ridgway's Case.*

Where

Where one is taken lawfully in Execution, and after discharged by Writ of Error, and after the Judgment is affirmed, a new *Capias* lies not against him, but Execution shall be awarded against his Sureties, if he will not render himself. But if the Execution is revers'd, because he was never lawfully taken in Execution (as if he be taken after the Year without any *Sci' fac'*) he may be retaken again. *Latch. pag. 292. Sir W. Fish and Wiseman.*

Escape.

Laying the Action and Declaration.

Rule. Debt upon Escape ought always to pursue the first Action. Therefore where the Plaintiff as Executor brought Debt against the Sheriff of L. on Escape of E. B. against whom he recovered a Debt of 82 l. as Administrator of I. S. reciting all the Record in certain: It is erroneous; for the first Recovery was as Administrator of I. S. and the Debt on Escape is as Executor of I. S. which cannot be, that one should die intestate, and have an Executor. *Cro. Jac. pag. 394. Sir H. Slingsby vers. Lambert. See before.*

The Plaintiff declares against the Sheriff of Devon for an Escape at Exeter, which is a City and County it self, and not Part of the County of Devon, yet good after a Verdict; for it shall be intended the Defendant had the Custody of his Prisoner in Exon, either by Hab' Corp' or on fresh Pursuit. *Sider. 364. Hopping and Holmes.*

The Plaintiff declares, That the Party was in Custody of both the Sheriffs of London, and the Action is brought against one of them, the Prisoner that escaped being in Ludgate, in the Custody of both Sheriffs, tho' the Action is only against one.

Aver-
ment.

dy of the Defendant only, the Declaration is good ; for the Prisoner was in Custody of both the Sheriffs, though he was in the Custody of the Defendant ; and it stands well enough with the Record, and the Words *existen' in Custod'* is a good Averment that he was in Custody ; and the Words, *ut præfertur*, do not hurt the Averment. *Stile's Rep. 297. Drinkwater and Pack.*

Declaration.

Whether
the She-
riff shall
take Ad-
vantage
of the In-
sufficien-
cy of the
Count.

Rule. *If the Party in his Declaration doth shew he hath no Cause of Action ; in such Case, if the Sheriff, by Force of a Capias to him directed, doth take the Party in Execution, and suffer him to escape, no Action of Debt lies against the Sheriff for this Escape. But in Dyer 67. a. 2 Bulst. 62, 9.*

In Action on Escape against the Sheriff or Gaoler they shall not take Advantage of the Insufficiency of the Count, but shall answer to the Escape: The same Law is of an Error in the Record or Discontinuance, because they are Strangers to it, no more than a Stranger shall falsifie a Recovery by Matter dilatory. *Dyer 67. a.*

Where
the De-
claration
ought to
mention
the first
Judg-
ment.

Rule. *The Declaration in Escape ought to mention the first Judgment ; or, the Plaintiff ought to shew he had recovered on Judgment. And it is not sufficient to say, quod recuperasset. The Case was, quod cum the Plaintiff recuperasset versus J. S. &c. prout patet per Recordum ; and that upon this a Capias issued out, and J. S. was taken by the Defendant, and escaped. It is too general, for non constat by the Declaration that any Judgment was ever given against him, and then he was not well taken in Execution. 1 Sanders 38, 39. Jones and Pope. Siderfin, pag. 307. 2 Keb. 63. Mesme Case,*

Case. 1 *Sanders* 34. *Careswel's* Case. And though the Sheriff be in Contempt if he let him escape, unless yet no Debt ariseth, unless there were a Judgment; there and though it be said the Sheriff took him in Execution, and for Debt, *unde convict' est*; yet this is but a Recital of the Writ. No Debt
unless
there
were a
Judgment

Declaration in Escape may be according to the Writ, (*viz.* That he escaped out of the Custody of the Sheriff or Bailiff.) This is in Action on the Case. *Siderfin*, pag. 332. May be
according
to the
Writ.

In Case, Declaration was, That the Sheriff (the Defendant) had arrested *L.* at the Suit of the Plaintiff by a *Lat.* sued out of the Court the 21st of January, and that by the Escape the Plaintiff had lost his Debt of 119 *l.* Upon Not guilty the Jury find, that the Writ was *Teste* 28th of November, but *revera* sued out of Court the 21st of Jan. and that *Habeas Corpus* was sued by the Plaintiff returnable *Mense Pascha*, with Intention to declare then against the said *L.* But the Defendant upon another Writ of *Habeas Corpus*, without the Assent or Notice of the Plaintiff, sued and returnable *Tres Paschæ*, duxit the said *L. ad respond'* to the Plaintiff in Trespass, *ac etiam Billa* of 19 *l.* where the said *L.* was in Custody of the Defendant *ad respond'* the Plaintiff *in Billa* de 119 *l.* and so the said *L.* was permitted to escape. Moved in Arrest of Judgment, because the Action is founded upon an Arrest at the Suit of the Plaintiff by Virtue of another Writ than the Writ found by the Jury; and the Plaintiff might have declared otherwise, (*videl'*) That he had sued a *Lat'* *Teste* 28 November. But *per Cur'*, there is *veritas Legis*, & *veritas Facti*, and the Declaration is according to the Verity of the Fact, and by Necessity of Law the *Teste* of the Writ ought to be in Term, and so is the Course. Judgment *pro Quer'*. Sir Thomas Jones Rep. pag. 149. *Wallury* and *Saltonstal*.

Tho'

Need not
shew he
did not
appear at
the Day.

Though it be not shewn that the Prisoner did not appear at the Day, for if he did not appear, then the Plaintiff was at no Loss; yet that is not Error in the Declaration; for tho' he did appear, yet the *Tort* is not purged. *Cro. El.* 289. *Appleton and Burr.*

That the
Defen-
dant ap-
peared
by Con-
sent, &c.

Note, Upon an Action of Escape upon Mean Process, Defendant pleaded, That after the Time of the supposed Escape, *H.* by Consent of the Plaintiff appeared at the Day of the Return of the Writ, *prout per Record' apparet.* Repl. *Nul tiel Record'* of the Appearance of *H.* by which it might appear, That he appeared by Consent of the Plaintiff. Defendant demurred especially, for that he put a double Matter in Issue, &c. 1 *Lutw.* 73.

Repl. ill.

It was insisted for the Defendant, That the Replication was ill, because the Allegation of the Appearance of the Defendant was sufficient; and the Allegation over, that it was with Consent, &c. was immaterial, and that the Plaintiff might have only traversed the Record of the Appearance.

Plea ill.

But on the other Side it was moved, That the Bar was ill. *Hobart* 210. *Webb and Canning's Case.* *Latch* 149. 1 *Jones* 138. *Calse and Bringles.* 2 *Roll. Rep.* 119. *Worsley's Case.* But by Consent, the Parties amended.

Amend-
ment.

Upon a
Return of
Cepi Corpus
& *parat'*
habeo.

A Declaration is against a Sheriff, That he suffered his Prisoner to escape, and had returned *Cepi Corpus, & paratum habeo*, whereas *revera* he had not the Body at the Return of the Writ. *Quare* if this Declaration was for the false Return, or for the Escape, or for both. — To this Declaration the Defendant might have pleaded the Statute of 23 *Hen.* 6. but he demurred generally

generally, and so has lost the Advantage of the Statute, which is a private Statute, and the Defendant has confessed the Escape by the Demurrer. Demur. *Vide supra. Sanders 154, 155. Benson and Welby. rer. Vide antea.*

So that if the Escape be well alledged, the Court will not countenance Error in other *Non-Formalities*.

The Declaration was, Whereas he had brought On E. a Writ of Debt against *M. W.* and recovered, and scape. shews all the Matter of the Escape, &c. and then it is, (as usually in the Common Bench) *unde queritur Unde queritur, quod cum* he brought a Writ of Debt against *M. W.* &c. and saith not the aforesaid *M. W.* and so it may be a Stranger, and therefore not good. *Cro. Jac. 188. Burton and Eyre.* But upon Conference with the Prothonatories, it is the common Course of in Actions on the Case after Recital of the Writ, Declaration in the *unde queritur* to begin *de novo*, and not to say *predict*, &c. And *per Curiam*, both Courses are well enough.

And so it is though there be an Error in Fact. Error in And as in the Case of *Jaques, Carol. 2.* which Fact not was, to be assigned on

On *Non omittas, Capias* and *Escape*. The *Capias* was of 50 *l.* and to answer 5 *l.* *Alano Lockart*, Prothonatory: And the Judgment in Debt on the Escape by Default is 50 *l.* and this was assigned for Error; for the Judgment and *Capias* was but of 50 *l.* as to the Party. But *Non allocatur*, for upon the whole the Judgment is right, and but an Error in Fact, which cannot be assigned on the Escape. 2 *Keb. 646. 2 Sanders 98. Jaques and Keble.*

In Escape against the Marshal, the Plaintiff Against declared, That whereas *J. S.* was indebted to the Marshal by Bond, and thereupon arrested by *Lattin* a Surrender in *tat*, and put in Bail, and the Plaintiff obtained a Judgment Court.

Judgment; who thereupon, in Discharge of his Bail, did render himself to Sir *John Lenthall* in Execution, and afterwards Sir *John Lenthall* (the Marshal) suffered him to escape. To this it was excepted, that he rendered himself to the Marshal; whereas he ought to say, He rendered himself to the Court; for it is the Act of the Court that turns him over to the *Marshalsea*, and a Judge can only take and discharge the Bail. But it is said here, That he rendered himself to Sir *John Lenthall* in Court; which is well enough. *Stile's Rep.* 330. *Child* and Sir *John Lenthall*.

As to Declarations upon Escape, after Delivery from the old Sheriff to the new Sheriff, and the Manner of Declaring, I shall cite two Cases, which will much inform us in that Point.

Declaration as to the old and new Sheriff. The Declaration was, That he was in Execution of the old Sheriff, and delivered to the new Sheriff, and then committed to the Marshal by *Habeas Corpus*, and then suffered to escape. *Cro. Jac.* 587. *Dowdswell* and Sir *G. Reynel*.

It must be shewed, that the old Sheriff delivered him cum caus. to the new Sheriff. This Exception was taken to the Declaration, because it was not shewed, that the ancient Sheriffs delivered him in Execution, with the Causes of Imprisonment to the new Sheriffs; for otherwise it is an Escape in them, and not in the Marshal, as in *Westbie's Case*. For it may be he was delivered *per Indenturam debito modo confectam* for other Causes, and this Cause was not mentioned. And a Declaration ought to be certain to every Intent; and tho' it be said *virtute cujus* he was in Execution under the new Sheriffs, yet that does not help it, for it is but the Conclusion of the Premises; and if the Matter before does not shew he was in Execution, that *prætextu cujus* will not serve.

Virtute cujus, &c.

In Debt on Escape. The Original and *Capias* which was returnable *Cras. Martin'* in *Michael'* — 78, was set forth: And that *Sydley in exit'* *ab Officio* in *December*, after the Return delivered him over to C. and it appears not that the Prisoner was ever in the Custody of *Sydly*. But by *Windham*, he could not else be turned over; and it is expressly said he was in Custody, and it may be, no Writ was returned by the Sheriff; and tho' in Law he cannot be in Custody till the Return, yet that shall be now intended; neither need it be said, That the Sheriff was continued in his Office above a Year. 1 *Keb. 632, Hargol and Creamer.*

Of declaring in *Escape* upon Outlawry, there are also two Cases which will greatly direct us: Declaring in *Escape* on Outlawry.

One was outlawed by the Plaintiff, and by *Habeas Corpus* he was delivered to the *Marshalsea*, and escaped. Now the Declaration may be for the Party only, and it need not be an Action on the Case *tam quam*, tho' here is a Contempt to the King. *Bridgman's Rep. 8. Moor* and Sir *George Reynell.*

The Plaintiff in Debt on *Escape* declares of a Case, not Recovery on 13. outlawed 15. and that he was Debt. taken up by *Cap. Utlagat'* 18 *Car. 2.* after the Year, and doth not declare that he was in Custody, nor that he was ever charged in Execution at the Suit of the Party, by Prayer on the first Judgment, (in which Case, tho' an Action on the Case will lie, yet not Action of Debt.

And after Verdict *pro Quer'*, *Maynard* moved Taking in Arrest of Judgment, That this Taking after the Year, after the Recovery and Judgment on the Year. Outlawry, does not make the Prisoner in Execution at the Suit of the Party, without Prayer; be-

because it may be intended, that the Party intended to have other Execution than the Body. And relied on *Frost's Case*. 5 Rep. 89. That until Election made, he is not in at the Suit of the Party. *Siderfin* 380. *Buckland and Kelland*. 2 Keb. 480. *Mesme Case*.

Tho' the *Capias* and 706. *Leighton and Garmon's Case*. The Court inclined, That tho' the *Capias* be after the Year, yet Debt lies against the Sheriff for the Escape, without any Prayer of the Party entred on Record; and that he which is taken upon a *Cap' Utlagat'* is in Execution at the Suit of the Party, till the Party disclaim it. 5 Rep. *Frost's Case*.

As to *Leighton and Garmon*, and *Shaw and Cutter's Case*, *vide supra*.

Declaration on Escapes in inferior Courts. As to the Manner of Declaring on *Escapes* in inferior Courts, or upon Removal out of inferior Courts, it need not be shewed how the Jurisdiction of the Court was, and how it was held; this being but Inducement to the Action.

Committed debito modo. And so is 1 Cro. *Moyse and Hodges*. 2 Kel. 19. *Drinkwater's Case*, the *Escape* being the material Part; and tho' 'tis said, the Party was committed *debito modo*, and doth not say, *prout patet per Recordum*, it is good enough, the Precedents being both Ways.

When the Jurisdiction ought to be set forth, &c. But in *Hodges's Case* the Difference is right. When the Jurisdiction of the Court ought to be set forth, and when not: The Declaration was; Whereas the Plaintiff in such a Court of *Pyepowders*, held at *Gloucester secundum consuetudinem Civitatis illius*, brought Action of Debt of 200*l.* against *Hodges*, and thereupon he was arrested, and under Custody of the Sheriffs of *Glou-*

Gloucester, who let him go at large. *Per Cur'*,
 In pleading a Recovery in inferiour Court, he
 ought to shew by what Authority the Court is By what
 holden, whether by Patent or Prescription: And Authori-
 this Court being stiled a Court of *Pyepowders*,^{ty.}
 (which is incident to Fairs and Markets, and is
 for Contracts arising in them) shall not be intend-
 ed to be a Court, unless it be shewed to be held
 by Charter or Prescription, and that the Sheriff Charter
 who is to take Advantage thereby, ought to shew or Pre-
 it. As *Stewards*, when they make any Certificate^{scription.}
 out of inferiour Courts, ought to shew therein how
 the said Courts are holden, for they best know
 their own Authority. But otherwise in the Case of
 a Stranger, as here, where the Stile of the Court
 is but an Inducement to his Action. *Cro. Car. 58.*
Hodges and Moys.

So Action on *Escape* on mean Process in inferi- Need not
 our Courts, by Virtue whereof the Defendants as set forth
 Bailiffs did duly arrest him, and they set not forth any
 any Plaint. And *per Cur'*, This is but Induce-^{Plaint in}
 ment, and cured by Appearance, the *Escape* Court.^{inferiour}
 being well set forth. 2 *Keb. 209.* *Pepper* and
Some.

In Action on the Case for *Escape*, it was al- Bailiff of
 ledged in the Declaration, That the Sheriff dire- a Fran-
 cted his Warrant to the Bailiff of a Franchise to ar- chise de-
 rest the Party; who arrested him, and delivered the Per-
 him to the Under-Sheriff in *ea parte autorizat'*,^{son ar-}
 &c. and shewed no Place where the Bailiff deli- rested to
 vered the Prisoner; for it may be, it was out of the She-
 the County. *Sed non allocatur*: For the Shewing^{riff, and}
 the Place was but Inducement to the Action; and at what
 when he pleaded Not guilty, the *Escape* is the Place.
 Matter material. *Cro. Eliz. 289.* *Appleton* and
Burr.

It is not alledged, that the Sheriff made a Warrant on ; but only that *A.* aforesaid, by Virtue of the Warrant aforesaid, took the Prisoner, and saith not, Within the Liberty aforesaid. *Sed non al- locatur.*

Profert in Curia of the Will. Action on the Case on *Escape* brought, and the Plaintiff declares, That the Party was in Execution at the Suit of the Testator; it is good, without saying, *profert in Curia of the Will.* 1 Roll. Rep. 78.

Escape brought by Baron and Feme. Baron and Feme brought *Escape*; the Baron arrests the Prisoner with a *Latitat* in his own Name sole: And now he declares, That he took out the *Latitat ea intentione* to discharge the Prisoner, upon a Bond made to the Wife *dum sola fuit*; and by three Justices, it is good.

Upon Attach. of Privilege. Action on the Case against a Bailiff of a Liberty on an *Escape* by a Clerk of the Hanaper in Chancery; and declares, That for Recovery of his Debt he prosecuted an Attachment of Privilege, directed to the Sheriff of *Middlesex ad respond' placito Transf. ea intentione*, that he should put in Bail for Recovery of his Debt on Bond; the Sheriffs of *Middlesex* directed their Warrant to the Bailiffs of *Westminster*, and he arrested him, and suffered him to escape. *Cro. Car.* 329. *Mynn and Hinton.*

Declaration ill.

The Declaration is naught:

1. Because he doth not say of what Liberty he was Bailiff, or whether he hath Execution or Return of Writs.

2. He

2. He alledges he had an Attachment of *Privilege* to arrest him in *Trespass*, intending after his Appearance to declare in *Debt*, which cannot be, unless in *B. R.*

And there the Reason is, because when he appears and puts in Bail, he is supposed to be *in custodia Mareſcalli*, &c. and declares against him in Custody: But it is not so in any other Court.

The Reason of declaring in Debt on *Trespass* in *B. R.*

Where the Sheriff shall have his Action against the Prisoner that escapes, and how he shall declare against him.

Upon a voluntary *Escape*, the Sheriff shall not have an Action on the Case against the Prisoner. *Action* *liter* upon a negligent *Escape*. *Mo. 597.*

against the Escaper.

Sheriffs of *N.* bring Action on the Case, and declare:

Whereas *J. S.* recovered against the Defendant in Debt of, &c. and a *Capias ad satisfaciend'* was awarded against him, by Force whereof they directed their Warrant to three Serjeants, &c. to arrest him, who did arrest him 26 Febr. &c. and he escaped, and afterwards was not found in the same County, *per quod* by Reason of the same *Escape* they were bound to answer the Debt *ad dampnum*, &c.

The Jury, on not Guilty, found that he was arrested about the 26th of Febr. and to this Declaration it was excepted:

1. They alledged they made a certain Warrant, By Warrant and say not *sub sigillo figillat'*, and a Warrant, and without a Seal is insufficient. *Per Cur'*, It is not said the usual Form, and they do not usually say, *sub sigillo*, &c.

B b 2

2. They

2. They say, They are chargeable with the Debt, but say not that they were charged or damnified; and if they be not damnified, they have no Cause of Action: For perhaps the Party will never sue them, or they may die before Suit, and then the Suit is gone.

Sheriff But *per Cur'*, Action lies on the Escape before they are sued; for the Party arrested did a Wrong to them by the Escape and Rescous, and they are on before always chargeable to the other Party; and if they he is sued. stay till they are sued, perhaps the Party that escaped may die, or fly the Country.

Jury find 3. The Arrest and Rescue is supposed the the Ref- 26th of *February*, which is uncertain whether it cue *circa*, were before or after that Day; and if it were &c. after the Day, it will not maintain the Declaration, for then it cannot be a Rescue the 26th Day.

Verdict But *per Cur'*, the Verdict is good before or good be- after the Day, so as it was before the Suit com- fore or menced. *Cro. El. 53. Sheriffs of Norwich versus after the Day. Bradshaw.*

Upon an If Judgment be given in Debt against the She- Escape riff on *Escape*, he shall have an Action on the by Li- Case against the Party that escapes, altho' the- cence. Gaoler licenseth him to escape, and he shall not plead this Licence. *Mo. p. 404. n. 541. Belchamber and Savage.*

Action Sheriffs of *London* brought Action upon the lies, tho' Case against *Pain*, because that he being in Ex- Plaintiff ecution under their Custody at *Spicer's* Suit, made had after- *Escape*, &c. The Defendant confessed all the Mat- wards ac- ter; but further pleaded, That after the Escape, know- *Spicer* had acknowledged Satisfaction (being after- ledged the Escape) upon Record of the Sum recovered. Satis- Demurrer. faction.

Per

Per Cur', The Action is maintainable, tho' the Plaintiff in the first Action had acknowledged Satisfaction, the Payment after doth not take away the Action, but mitigates the Damage only: For the Act of a third Person shall not take away the Action once vested. 1 *Leon.* 237. n. 321. *Offley and Saltington* versus *Pain*; and *Hill's Case* there cited: But see after, *Chap.* 23. Plea allowed good.

Fitzh. N. B. 130. b. It is said there, The Plaintiffs in this Action ought to shew, that they had been impleaded by him who recovered; for they cannot have this Action before they are sued. *Qu.* If they ought to shew they were impleaded.

C H A P. XXIII.

Of Pleadings by the Sheriff to Actions brought for Escapes. What shall be said a sufficient fresh Pursuit, and where upon fresh Pursuit made he may retake the Prisoners, or not: And where the Prisoner, upon his being retaken, shall have his Audita Querela, or not. Fresh Pursuit, how to be pleaded. Pleading the Statute of Limitations. Pleading Acknowledgment of Satisfaction on Record by the Plaintiff, or Accord with Satisfaction. Nul tiel Record pleaded, and how. Escape by the Plaintiff's Consent. By the Sheriff's Licence. Traverses, Superseas, Protection, Privilege pleaded. Bar by the voluntary Escape. Venue, Issue, Evidence and Special Verdict. Of Escapes of Felons.

Of Pleadings.

Non permittit, or

Fresh Pursuit,

AS for the Pleading to *Escapes* directly, the Defendant either denies the *Escape*, and then he pleads *Non permittit ire ad Largum*, or else he confesseth the *Escape*; but pleads that he made *fresh Pursuit*, or that he escaped by Licence of the Plaintiff.

There are other Pleas common with other Actions, as Statutes of Limitations, Satisfaction, *Nul tiel Record*, &c. *Nil debet*.

But I shall first treat of Pleading *fresh Pursuit*: And as to the right Understanding of that, I shall enquire.

What

What shall be a sufficient fresh Pursuit; or where upon a fresh Pursuit of the Sheriff, he may retake the Prisoner, or not; and where the Prisoner upon his being retaken shall have his Audita Querela or not. See before of fresh Pursuit, Chap. 21.

Though the Prisoner that escapes be out of the View, yet if he be taken in *recenti Executione*, he shall be in Execution again; and though he fly into another County where the Sheriff had not Power, yet for as much as the Escape was of his own Wrong, (whereof he shall not take Advantage) the Sheriff may retake him in another County, and he shall be in Execution. And fresh Pursuit is not that he must have him always in his View; but if he makes fresh Pursuit, so that it doth not appear fully there was a Default in the Sheriff in his Pursuit, though he be a Day and a Night out of his View, yet he shall be said to be in Execution for the Party against his Will upon the Retaking; as if the Prisoner escape to an House, and the Sheriff sets a Watch and takes him when he comes out.

Though Prisoner be out of the View.

If Sheriff makes no Default.

If the Gaoler make a fresh Pursuit before any Action commenced, and he is retaken, the Gaoler shall be excused; but it is otherwise, if before the Prisoner be retaken the Party brings his Action, for at the Time of the Action brought he had good Cause of Action: But it seems by *Winch. p. 53.* that retaking upon fresh Suit after Action, is good, but not after Issue joined. *Cro. Jac. 657. Whiting* and Sir *G. Reynell's Case.*

If the Sheriff retake him on fresh Pursuit before Action brought, he shall be excused.

Stow, Attorney of *C. B.* was in Execution in *Norfolk* for 1000 *l.* and he by Practice procured himself to be removed by *Habeas Corpus* before *Coke* Chief Justice, at the Assizes in *Lent*, and then escaped

Escape at the Assizes in *Norfolk.*

Taken at
London
next
Term,

escaped to London, and in Easter-Term following the Bailiff did retake him. The Opinion of the Court was, That the fresh Suit made was good, though he took him again at the End of the Year, if Enquiry was made after him, and so by Consequence Action for false Imprisonment against the Bailiff did not lie. *Mich. 8 Jac. B. C. Stone's Case.*

If the
Sheriff
does not
make
fresh Pur-
suit, yet
he may
retake
him,

If the Plaintiff bring his Action before the Sheriff retake him, or if the Sheriff does not make fresh Pursuit, yet in both Cases the Sheriff may retake him, and keep his Body in Custody till he agree with him, or he may have Action on the Case for his tortious Escape: And where the Prisoner escapes of his own Wrong, and is retaken, he shall never have an *Audita Querela* against the Sheriff; but if he escapes with the Consent of the Gaoler he cannot retake him, and if he do, the Party shall have *Audita Querela*: If one in Execution escape, the Sheriff may not retake him

Trespass
lies, tho'
he may
not re-
take him.

but upon fresh Pursuit, but he shall have Action on the Case against him, or *Trespass quare prisonam fregit*. 3 Rep. *Kidgway's Case*. *Poph. 41. Mesme Case, Jones 145. Harvey and Reynel's Case. Cro. Jac. 657. Whitney's Case. 2 Roll. Rep. 282, 283. Mesme Case.*

If the Pri-
soner dies,
yet Acti-
on lies a-
gainst the
Gaoler.

A Prisoner escapes, the Gaoler makes fresh Pursuit, and before he hath taken him the Prisoner dies; this is the Act of God, and yet because it was once an Escape, the Action of Escape lies against the Gaoler. *Poph. p. 186.*

In fresh
Pursuit
Sheriff
not to
break
open a
Chest.

Upon Escape, the Sheriff may not in fresh Pursuit enter into the House of *J. D.* and break the Chest of *J. N.* to search for the Prisoner. 2 Roll. *Abr. 564. Bennet and Gray.*

If

If a Man in Execution in the County of *Devon* escapes into the County of *Somerset*, where he is taken in Execution at another Man's Suit, and after the Sheriff of *Devon*, on fresh Pursuit, finds him in Prison in *Somersetshire*, it is made a Question, how he may charge the Sheriff of *Somerset* with the first Execution, or put the Party in Execution, seeing he shall not retake him. 1 *Roll.*

Abr. 902.

Though Information lies against the Sheriff for Escape, yet it lies not on Escape after taking by fresh Pursuit, no more though the Information be depending before the Taking, so that the Officer's Diligence appear. 2 *Keb. 384.* The King against Sir *J. Lenthall.*

Fresh Pursuit pleaded.

The Plaintiff counts of an Escape in *London*, and the Defendant justifies the Retaking in *Devon*; so that the Escape at *London* is not answered, it is naught upon Demurrer; but when the Defendant by his Replication denies not the fresh Suit, but by Protestation relies upon this, That he was out of the View (which is not material, for it is not the Form of Pleading to say he had him in his View, &c.) it appeared not to the Court that he had Cause of Action; now this Bar is sufficient for the Matter, but insufficient for the Form, and there being no Demurrer, but a Replication, no Advantage shall be taken of the Bar for Matter of Form. 3 *Rep. Ridgway's Case. Popham p. 41. Mesme Case.*

Action on the Case for voluntary Escape; Defendant pleads, he escaped in *November* by Negligence, and traversed not voluntarily, and that he freshly pursued and took him, and that *postea*, *vi-suit*, but *delicet*, 27 *Aug.* he died, to which the Plaintiff demurred, *ante Ex-bib. billa.*

murred, because before the Escape, and especially for the void Traverse. But *per Cur'*, the alledging the voluntary Escape is immaterial, and the Sheriff chargeable without it, and he need not traverse the voluntarily Escape, but because he doth not say he died *ante exhibitionem billæ*, Judgment for the Plaintiff. 3 *Keb.* 55. Read and Bovey.

Nar. of volunt- The Plaintiff declared of an Escape voluntary, the Defendant shews a negligent Escape, it is good ry Bar by without a Traverse. *Latch. p.* 203. *Harvey* and negligent *Reynell*.
Escape.

In Debt on escape, Plaintiff declares, That the Defendant (Sheriff of *Devon*) suffered one C. who was in Execution to escape in *London* 18 *December*. Defendant pleads, That the said C. escaped the 16 *December* in *Com' Devon*, and that he freshly pursued him, and retook him the 17th of *December*, and retained him again in Execution, *absque hoc*, that he is guilty *alit' vel alio modo*.
Defen- On this it is demured, because the Escape is sup-
dant must answer to posed to be the 18th of *December*, and he pleads
the E- the Escape the 16th of *December*, and the Retain-
scape as the 17th of *December*, and so he answers not
to Time, to the Escape mentioned in the Declaration, for
the Traverse *aliter vel alio modo* doth not answer
to the Time, but to the Manner of any Thing al-
ledged, and *per Cur'* the Plea is ill. *Cro. Eliz.*
439. *Ridgway's Case*.

On *Nil de-* On *Nil debet* pleaded in Escape, fresh Pursuit
bet in E- may be given in Evidence; so a Release, or any
scape, Thing that destroys the Duty. *Vide supra Tit. E-*
fresh Pur- vidence. 3 *Keb.* 308. *Lutterel* and *Mosedell*.

Now as to other Pleas, and the Formality of Pleading, what shall be good or not; the Cases following are of great Consideration to instruct us in that useful Learning.

Debt

Debt for an Escape is not within the Statute of Debt for Limitation, though Action on the Case is; the Words of the Statute are, *All Actions of Debt grounded on any Lending or Contract, without Specialty, shall be brought within six Years.* 1 Siderf. 205, 206. 1 Sand. 38.

Now first, This Action is not founded on any Lending or Contract; here is a Duty created by the Law without Lending or Contract. 2 Inst. 388.

2. This Action is founded on a Specialty, (*viz.*) 'Tis on a Statute Law; for at Common Law no Debt on Escape lay against a Gaoler, &c. of one out of Execution, and the Statute of 1 R. 2. c. 12. gives the Action of Debt against the Warden of the Fleet; and this Statute by Construction extends to all other Gaolers and Sheriffs. 1 Sand. 37, 38. Jones and Pope.

Acknowledgment of Satisfaction on Record is a good Plea. Acknowledgment

The Sheriff brought an Action on the Case against J. for making his Escape out of Execution; Defendant pleads confessing all the Matter, and that after this Escape, he at whose Suit he was condemned, had acknowledged Satisfaction on Record. To which it was demurred. *Per Cur'*, The Plea is good, because the Defendant is to be charged; for that the Plaintiffs are chargeable with the Debt, and not otherwise; and the Defendant hath pleaded Satisfaction acknowledged on Record, which may by his Means, and is not denied; for otherwise the Plaintiff might have shewed the Special Matter by Replication. Cro. Eliz. 237. Salteston and Payne. Vide *antea*.

Ac-

Accord
with Sa-
tisfaction,
where no
Plea.

Accord with Satisfaction is no Plea. In *Scire fac'* on Judgment in Escape on *Oyer*, the Defendant pleads *Executio non*; because that after the Judgment the Defendant assigned the Obligation of Security of *T.* the Party who escaped, which the Plaintiff received and accepted. To which the Plaintiff demurred. And *per Cur'*, Accord with Satisfaction is not pleadable after a Judgment. 3 *Keb.* 255. *Poole* and *Mosedell*.

Nul tiel
Record.

Nul tiel Record is a good Plea.

Debt on Escape against the Sheriff upon a *Capias Utlagat'* after Judgment: Defendant pleads there was no such Record of the Debt and Damages. It is a good Plea on Demurrer. 1 *Brownl.* 51. *Maddox* and *Young*. *Hob.* page 209.

Com-
mand of
the Plain-
tiff.

In Debt on Escape one may plead, That the Plaintiff commanded him to let him out of Execution. *Cro. Car.* 329. in *Vesey's Case*.

Escape by
Consent
of the
Plaintiff
pleaded.

In *Scire fac'* on a Recognizance, as Bail in a Writ of Error in the *Exchequer-Chamber*. The Defendant pleads, That the Plaintiff sued a *Capias ad satisfaciendum* out of the *King's Bench* to the Sheriff of *Middlesex*, and he was taken in Execution thereon, and suffered to escape by the Plaintiff's Consent. The Plaintiff demurs, because they do not lay a Place where the Court was held, nor where the Party escaped by Consent. 2 *Keb.* 567. *Mod. Rep.* 19. *Prinn* and *Smith*.

Place o-
mitted.

Where
Payment
of the
Money is
good, or
not.

Release
pleaded.

Payment of the Money to the Marshal is no Bar; but Payment to the Sheriff on a *Fieri fac'* is good; for he is commanded to levy the Money, &c. but no such Authority is given to the Sheriff, Sir *Tho. Jones* p. 97. *Taylor* and *Baker*.

In Escape, the Defendant pleads a Release of him who recovered, to the Prisoner, being in Execution;

ecution; it is holden no Plea, *Nil debet* in Debt on Escape. 19 H. 6. 14.

As to the Traversing, and Forms of Pleading.

In Trespass and Imprisonment the Defendant That he justifies by Virtue of a *Capias*, and the Plaintiff escaped did afterwards escape, and he being Sheriff did by the Sheriff's follow him by Virtue of the said Warrant, and Licence, took him upon the *Capias*. The Plaintiff replied, is good He escaped by Licence of the Sheriff, and Tra- without a verse of the latter Taking by Virtue of the Traverse Warrant. *Per Cur'*, the Traverse is idle, because the Plaintiff had sufficiently confessed and avoided; and if he escaped by the Sheriff's Licence, that ought to be the Thing put in Issue, and not the Traverse. 1 *Brownl.* 197. *Hutton and Hunn.*

Action on the Case upon Escape was brought Plea by a against a Serjeant of London. He pleads that the Serjeant Sheriff commanded him to deliver his Prisoner to of London. him; which he did, and traversed that he was guilty of the Escape, *aliter vel alio modo*. *Per Traverse Cur'*, The Serjeant is an Officer of the Sheriff, *aliter vel alio modo*, and the usual Manner of Pleading is to plead, That the Prisoner was in Custody of the Sheriff; and Sheriffs in London may make their Houses their Prisons, as well as the Counters, and the Bar was good, but the Traverse was ill. *Siderfin p. 318. Husband and Cole. 2 Keb. 147. Mesme Traverse ill. Case.*

This Plea is a Confession and Avoidance, and Not guilty. the Traverse is ill. But, *per Cur'*, here is no E-ty, better. scape confessed, and therefore *Not guilty* should have been pleaded, and not to take a Traverse.

Debt against the Sheriffs of London upon Escape Three of A. The Plaintiff declared on an Execution Years by specified.

by Force of the Recovery, and that the Party was in the Prison of *Ludgate*, *sub custod' J. S. & J. D.* then Sheriffs. 1 *H. 8.* and that he so continued *sub custodia J. B. & J. G.* 2 *H. 8.* and so continued *sub custodia J. N. & J. L.* 3 *H. 8.* and then was suffered to escape. *J. N.* and

And one pleaded to, but not precisely.

J. L. pleaded, That before the Escape at such a Day, *Anno superius in Narratione specificato*, the said *J. D.* and *J. S.* *adtunc Vicecomites* suffered him to escape.

Plea to be precise as to Time.

Per Cur', It is no Plea, because there was three Years specified in the Declaration, and it shall be taken that it was the First or Third of *H. 8.* when they were out of their Office; yet it is meerly induced by the *adtunc Vicecomites*, which shall lead the Intendment to be in the Year in which the Defendant supposeth they were Sheriffs.

It must be alledged in Fact.

But *per Cur'*, that sufficeth not, but the Plea must be alledged in Fact; and therefore the Defendant's Meaning to discharge themselves by former Escape, which was not in their Time, should alledge it precisely. *Dyer 66. Serjeant Minor's Case.*

After *Nil debet* he may not relinquish his Plea.

In Debt for an Escape of one in Execution Defendant pleads *Nil debet*; and after Issue, and the Cause entred for Trial, the Defendant would acknowledge the Action with *Relicta verificatione*. But, *per Cur'*, this he may not do without the Assent of the Plaintiff; for many Defects are aided by Verdict. *Sir Tho. Jones Rep. 156. Marshall and Cooling's Case.*

The Plaintiff chargeth the Defendant with an Escape 13 *April*, 18 *Jac.* and the Defendant pleads Escape 29th *Feb.* 16 *Jac.* which was a Year and two Days before the Escape alledged by the Plaintiff; to which the Defendant made

no Answer, and altho' he concluded it was the same Escape, which makes the Plea good where the Time is not material, yet in the principal Case the Time seems to be material; for the Defendant (the Marshal) pleads, That the Prisoner was committed to him by *Habeas Corpus*, and that he remained in his Custody from such a Time till such a Time, during all which Time the Plaintiff never prayed to have the said Prisoner in Execution. *Bridgman's Rep. p. 7. Moor versus Sir G. Reynall.*

In an Escape, The Defendant confesseth that *H. Superfede-* was in his Custody by *Latitat*, returnable *Mercurii Crast. Animarum*, but said, that a *Superfede-* as came to him (which varied from it) reciting a Writ returnable *die Veneris Crastino Animarum*; for which Variance the Plaintiff demurred as being not the same Action, which the Court agreed. 1 *Keb. 234. Earl of Bedford against Austin.*

In Action on Escape in Debt on Judgment, Proteſt- Defendant pleads, That after he was arrested, he was discharged by Protection shewed to the Bailiff, as Servant to the Earl of Bath. *Per Cur'*, the Plea is naught. 1 *Keb. 660. Cockman and Symonds.*

In Action on the Case on mean Process, Sheriff Privilege pleads, That a Writ of Privilege came to him of *Seſſi-* *Teſte* Marquess of Newcastle, returnable at Sessions: Which recites, That by the Law of England, Persons shall be privileged in going to, and returning from the Sessions. To which the Plaintiff demurs, and the Court held the Plea to be ill; yet the Court were in Doubt upon a second Motion, whether the Privilege shall extend to such inferior Courts. Also it is ill pleaded, not shewing where the Writ issued, nor where the Session was, nor whether the Discharge were in Session.

Sider-

Siderfin p. 269. *Clark and Mollineux.* 3 *Keb.* 845. *Mesme Case.*

The Advantage of pleading the Stat. 23 H. 6. lost by Demurrer. In Action on Case of Escape and false Return, if the Sheriff demurs generally upon the Declaration, he loseth the Advantage of Pleading. *Stat. 23 H. 6. c. 10. Vide supra. Benson and Welby.*

Venire.

***Venire* changed when.** In Action of Escape, *Venire* shall not be changed, nor in Debt: For these may be all over *England.* 1 *Keb.* 65. *Wright and Martin, Stile's Rep.* 241.

By the Marshal's Privilege, the Jury on Escape were changed out of *London* into *Middlesex,* 2 *Keb.* 818. *Crook and Mosedale.*

Hale said, He knew him after *Imparlanoe* ousted of this Plea; but here the Court would not put him to plead it, but granted a Trial in *Middlesex,* and Escape in *London,* being so every where. *Cro. Eliz.* 625.

From whence. *Venire* is most proper to be from the Place where the Escape was.

Action laid in either County. Action is brought against the Defendant as Sheriff for the Escape of *R.* in *Norfolk,* and falsely returning *Non est inventus* in *B. R.* the false Return is not the Principal, but the Escape is the Cause of Action; and the false Return which is also made in *Norfolk* is but Aggravation, the Party may lay it in either County. 2 *Keb.* 771. *Russel and Sucklin.*

Difference. Where the *Venire* and Return differ, it is not good. *Hetley* 85.

No Cost on Non-suit. *Per Cur.* No Cost shall be on Non-suit in this Action, by the Stat. 32 *H.* 8.

Of Escape being pleading in Bar.

It has been adjudged as well on *Scire fac'* as in Bar that Debt, that to plead he was in Execution and *contra* he *voluntatem* of the Sheriff escaped, is no Plea; no, ^{escaped} tho' it were by Permission. *Vide* 3 *Keb.* 305. ^{contra vo-} *Ridly* and *Morslee.* *Cro. Car.* 24. *Robinson* and *Clapton.* *Vilner's Case,* *Allen*son and *Butler,* *Symonds* and *Cottmar.*

To a *Scire fac'* on Recognizance as Bail in Error, Escape Defendant pleads, that the Plaintiff after Judgment by Con-
fused a *Capias ad satisfaciend'* out of the King's ^{sent of} *Bench,* and that the Defendant was thereupon taken, and that he escaped by Consent of the Plain-
tiff. *Per Cur'*, The Plea is ill for want of Place; it is not said where the Court was held, nor whether the Party escaped by Consent. 2 *Keb.* 567. *Moor. Rep.* 19. *Prin* and *Smith.*

To *Scire fac'* on Judgment in Debt, Defendant But by pleads a *Capias ad satisfaciend'* issued out of the volunta-
Court of King's *Bench,* and that he was taken ^{ry E-} thereupon, and on *Habeas Corpus* out of the Com-^{escape, ill} mon Bench, he was committed to the Custody of ^{as to Par-} the Warden of the *Fleet,* and that the Warden suf-^{ty-Plain-} fered him voluntarily to escape. To this it was de-
murred, because he concludes not aright: And *Per Cur'*, the Execution must be alledged by Mat-
ter of Record, and therefore he must conclude his Plea, *prout patet per Recordum*: The Difference is *Prout pa-*
between Process that requires no Return, and where ^{tet per} the Record whereby he is committed is shewed. The *Record.*
Committitur in an Action of Escape is but Induce-
ment, but in a Justification it is Substance. Upon *Committi-*
a *Capias* or *Latitat* he need not so conclude, but ^{tur, where} here is Matter of Record also, here the Matter of ^{but In-} the Bar is not the Matter of Fact, but the having ^{duce-} sued out Execution on Record. And secondly, ^{ment and} ^{It where} is Substance

Negli-
gent.Volunta-
ry.Consent
of Plain-
tiff.

is all one as to the Party, whether he escape by the Sheriff's Negligence, or voluntarily. If the Party negligently escape, the Party and the Sheriff may take him again; but if voluntarily, then only the Party may take him again, but not the Sheriff; but if the Sheriff let him go by Consent of the Plaintiff, then neither can take him; and Bar by voluntary Escape is held ill. Judgment *pro Quer*, 2 *Keb.* p. 187, 206. *Alenfon and Butler.* 2 *Keb.* 802. *Villner and Allen. Vide antea.*

Until of late Time the Discharge of the Gaoler was a good Discharge. As in 3 *Co. Ridgway's Case. Hob.* *Case of the Earl of Essex, 8 Rep.* *Dr. Drury's Case*, but now the Law is taken otherwise. *Vide supra.*

*Audita
Querela.*

In *Audita Querela*, voluntary Escape in the Sheriff is no good Surmise, but that the Sheriff may retake him again. *Vide supra.* 1 *Roll. Ab.* 902. *Trevillian's Case. Hob.* 202. *Sheriff of Essex. Vide Gen. Abridgm. Tit. Audita Querela.*

Escape.

Of Issue, Evidence, Special Verdict.

On *Nil
debet.*
fresh
Pursuit
given in
Evidence

In Debt for Escape on *Nil debet* pleaded, the Defendant may give fresh Pursuit in Evidence. And by *Hales*, at a Trial at Bar said, He always let them give in Evidence fresh Pursuit on *Nil debet.* And by *Wild*, it is done generally. *Mod. Rep.* 116. 3 *Keb.* 305. *Mosedell's Case.*

Evidence
in fresh
Pursuit.

In Action against a Gaoler upon Escape of a Prisoner in Execution: If the Issue be, whether the Gaoler immediately after the Escape made fresh Suit against the Prisoner, &c. and the Evidence is given, that a Prisoner escaped out of Prison by the

the Negligence of his Keeper, and is absent a Day and a Night, and the Keeper knows it not (having many other Prisoners under his Care); but when he had Notice of it, he immediately makes fresh Suit after him, and retook him: This is an immediate fresh Suit to maintain the Issue, for convenient Pursuit is an immediate Pursuit in Law. 2 Roll. Abr. 681. *Hinton* and Sir *John Lenthall*, and *Elton* and Sir *John Lenthall*, on Evidence at the Bar, where the Evidence was, that he escaped at nine a Clock at Night, and the Notice and fresh Suit on which he was retaken, was the next Morning at nine a Clock.

Issue was, Whether *A.* was taken by a *Capias* If taken as at the Suit of *B.* and Evidence was taking by a at the *Capias* at the Suit of *C.* and then a Delivery of Suit of *B.* *Capias* at the Suit of *B.* to the Sheriff; it is good Evidence; for tho' he were taken before, yet this was at the Suit is a new Taking in Law as to this Execution. So of *C.* &c. if the Issue be of a Taking on a *Capias ad satisfaciend'*, and Evidence be by a Taking on a *Capias Utlagat'*, or *pro fine* with a Prayer of the Plaintiff, that he may remain for Satisfaction.

Issue was, whether *J. S.* was taken with a *Capias*. Evidence was given by an *Alias Capias*, and *Alias Capias* good. *Hob. p. 54.*

In Debt on Escape against the Marshal, and *Nil debet* pleaded. The Evidence was an *Habeas Corpus ad Testificand'*, and that the Prisoner went down too long before-hand, and staid too long after the Assizes were done at *Wells*, and that he went 60 Miles beyond *Wells* before he returned again. *Verdict pro Quer.* for 620 l. 1 Mod. Rep. 166. *Mosedell's Case.*

In Escape upon a *Capias* returned, *ne unques en son gard* shall be tried by Record: But upon a *Capias* not returned, the Prisoner shall be tried *per Pais*. *Ne unques en son gard*, how, tried, Roll' 2 Abr. 574.

Imprisonment on the Execution The Imprisonment upon the Execution, and not for other Cause in Escape, shall be tried by the Record. But in Escape against the Mayor of a Staple, for suffering J. S. in Execution upon a Statute-Staple to go at Large, if the Defendant say he was not in Prison upon the Execution, but upon Complaint there, this shall be tried *per Pais*, and not by Record; because it would be unreasonable, the Defendant should certify a Record where he himself was concerned.

Upon Arrest in one County, and Escape in another. In Escape upon Arrest in one County, and Escape in another County; upon Not guilty, this shall be tried, where the Escape is laid, for the Action is upon the Escape. *Roll. Ab. 602.*

To be where the Escape was. Action on the Case against a Sheriff upon Escape in London, and the Arrest laid to be in Southampton; *Per Cur'* The *Visne* shall be where the Escape was, because that is the Ground of the Action, and not where the Arrest was. 3 Cro. Richbel and Goddard.

Changing the Visne. Note, In Action on the Case for Escape or Deceit, the Court will not change the *Visne* out of the County where the Plaintiff supposeth the Thing to be done. *Siderfin p. 87.*

Arrest in Yorkshire. In Action on the Case against the Sheriff of York for an Escape, and declares that he arrested the Prisoner in the said County, and after suffered him to escape at D. in Com' Nottingham.

Escape in Nottinghamshire. To which the Defendant pleads Not guilty. This Issue may be tried by the County of Nottingham only, without joining the County of York; for the Action and Issue is upon the Escape, and not upon the Arrest. *M. 40 & 41 El. B. R. Bennion and Watson.*

Non per-misit, &c. Debt against the Marshal for suffering T. B. in Execution at the Plaintiff's Suit to escape. De-

Defendant pleads, he did not suffer him to escape: And gave in Evidence, That *T. B.* brought Evidence Attaint to reverse the Judgment, and upon his^{thereon} Prayer the Court bailed him, that he might prosecute the Suit with Effect. But this Bail was not entred of Record. And the Court held it good Evidence. The Escape supposed here is for Bailing is letting him go by Bail, which is the Act of the^{the Act} Court and not of the Marshal, and may well be^{of the} given in Evidence. *Cro. El. p. 5. Vast and Court.*
Gaudy.

By *Wray*, upon Execution sued after Verdict, Bail upon altho' the Party sues Attaint, the Court usually^{Attaint.} does not bail him, for the Verdict is intended true till reversed, but on good Considerations they may: And tho' the Bail be not entred, yet the Plaintiff for his Benefit may cause it to be entred, and then he may have a *Scire fac'* on the Bail, and so is not at any Mischief.

The Party being charged in mean Process when^{Committitur} he was in Custody, the Evidence may be good^{to be} without proving any *Committitur*; but if he^{proved.} were in Execution, the *Committitur* upon the Roll shall be proved. *Siderfin 237. the King and Povey.*

In Debt *sur Escape*, if the Defendant plead *null*^{Evidence} *Escape*, he cannot give in Evidence no Arrest.^{upon no}
Trial per Pais 174. Clayt. 34. ^{Escape}
^{pleaded.}

Verdict.

In Debt on Escape, if the Plaintiff declare of an Escape a-
Escape of two, and it is found one only was ingainst
Execution; yet the Verdict is good, and the Plain-^{two, and}
tiff shall have Judgment. *Siderfin. p. 5. An- found a-*
drews's Case. ^{gainst}
^{one only.}

On the Escape of the Plaintiff declare of
 Escape of the *Baron* and *Feme* out of Execution on
Baron and Judgment for the Debt of the Wife *dum sola*, and
Feme, the Jury find the Husband only was in Execution;
 Jury find yet the Verdict is good, and the Plaintiff shall have
 the *Baron* Judgment. The Jury found not that the Wife was
 only in taken in Execution (being for Debt contracted be-
 Executi- fore Coverture). *Sider. p. 5. Roberts and Herbert.*
 on. 1 *Keb. 371. Mesme Case.*

Verdict Tho' the Verdict finds an erroneous Process, yet
 finds an the Sheriff shall not take Advantage thereof. As
 erroneous: in Debt on Escape, and special Verdict finds an
 Process. *alias* into another County, without a *Capias* in the
 proper County, and that he was in Execution and
 escaped. Judgment *pro Quer.* on 2 *Cro. 1. pl. 1.*
& Co. Dr. Drurie's Case, because the Sheriff is a
 Stranger, and shall have no Advantage thereof.
 3 *Keb. 629. Hide and Hillar.*

Verdict One rescued himself and escaped, and the Sheriff
 on Res- brought Action on the Case. On Not guilty, the
 cous be- Jury found he was arrested *circa* the 26 of *Februa-*
 fore the ry, and then and there rescued himself. *Per Cur.*
 Day laid, be the Rescous before or after the Day supposed in
 or after. the Declaration, it is good enough, so as it be be-
 fore the Suit commenced. *Cro. El. 53. Sheriff of*
Norwich and Bradshaw.

Arrest of Judgment.

See the Case of *Gold versus Strode.* 3 *Mod. 324.*
 325. Of Moving in Arrest of Judgment on an Ac-
 tion of Escape against the Sheriff, That the Sheriff
 shall not take Advantage of an erroneous Judg-
 ment.

Consideration

Consideration on Assumpsit, about Delivery of Prisoners in safe Custody, and saving harmless of Escapes.

The Sheriff having one in Custody takes *Assumpsit* of J. S. to deliver the Prisoner to the Bailiff in safe Custody: This is a good *Assumpsit*, and no Escape; for the Court will not intend, that the Bailiff was absent from the Prisoner. *Sid. pag. 132. Benskin and French.*

In Consideration the Plaintiff (who sueth as Bailiff) would permit J. S. taken in Execution to rest in the House of N. till Friday next; if he escape, the Defendant would pay the Debt.

By *Hale*, The Consideration is good in Mean Process, but being in Execution it is ill. But the Action must be brought by the Bailiff or no-body; but Consideration to make a Special Bailiff is sufficient to save harmless. This is no Bond or Promise taken of the Prisoner, nor of any for him, therefore it is not within the Statute. 2 *Keb. 805. Feake and Carter. 1 Leon. pag. 132. Palmer and Smalbrook.*

The Bailiff assumes to save the Sheriff harmless of all Escape, it is not good. The Declaration is, That a *Ca. sa.* on a Judgment was awarded against the Defendant to the Sheriff of *Suff.* who directed his Warrant to the Plaintiff as his Bailiff to serve it; and that the Plaintiff assumed to the Sheriff to save him harmless of all Escapes, and that by Force of the Warrant he arrested the Defendant, and the Defendant intending to make the Plaintiff to be charged, escaped; for which the Plaintiff in the first Action brought an Action against J. C. the Sheriff, upon this Escape, and recovered, and J. C. brought

And by this Action on the *Assumpsit*. It was moved in Arrest of Judgment, that there is no sufficient Cause in the Declaration no maintain an Action, for tho' the Sheriff may have Action on the Case against the Prisoner that escapes, yet the Bailiff shall not have it. *Per Cur'*, For the Bailiff was not chargeable to the Sheriff by Law, but by *Assumpsit*, and this being his voluntary Act shall be no Cause to charge the Defendant, but shall only make himself chargeable. But they agreed, If the Bailiff had been chargeable by Law without such Promise, Action lay for him against the Defendant, who caused him to be charged. *Cro. Eliz.* 349. *Allerton and Harwood*.

In Consideration he would permit him to go at large, and of 2 s. paid, he promised to pay all the Money in which the Party was condemned in Execution. *Per Cur'*, the Consideration is not good, being contrary to the Statute of 23 H. 6. and that a Promise and Obligation was all one; and though it be joined with another Consideration of 2 s. yet being void, and against the Statute for Part, it is void in all. *Cro. El. p. 199. Tetberston's Case. Pl. Dive and Manningham*.

Where Plaintiff declared, Whereas the Defendant was arrested at his Suit on Process; the Defendant, in Consideration that he should be permitted to go at large, promised that he would appear at the Day of the Return, or would give him 10 l. and he did not appear at the Day. *Per Cur'*, It is a good *Assumpsit*, being made to the Party which had Authority to dispense with his Appearance: Had it been made to the Sheriff, or to any other to his Use, it had been within the Equity of the Statute of 23 H. 6. *Cro. El. 190. Millward and Clarke*.

Of Escapes of Felons, &c.

All that are Prisoners are such, either by Matter Prisoners of Record, or Matter in Fact.

By Matter of Record, when one present in Court is committed to Prison by the Court; there if the Gaoler has not him ready, it is an Escape without more Enquiry (unless he had reasonable Excuse), and the Judges will set the Fine presently.

By Matter *en Fait*, a Man is a Prisoner when he is arrested by Sheriff, Bailiff, Constable, &c. and in escapes, there the Jury ought to find it, and present it before the Justices, and the Justices assess the Fine.

Upon a *Capias* for Felony, the Sheriff returns *Cepi Corpus*, and hath not the Body at the Day, and the Sheriff was amerced for the Escape at 50 l.

By some, it is Felony in the Sheriff to suffer a Prisoner to escape, *vide Stat. de frang. Prisonam.* If the Gaoler suffer the Escape, it is Felony in him, and Forfeiture of the Office. 6 H. 7. 11. 10 H. 7. 26. 9 Rep. 98. Co. on M. Charta. Keil. 195, 196. *Vide Dalt.* 567.

The Statute of 4 Ed. 1. *de frangentibus Prison'* mitigates the Rigour of the Common Law; for before that Statute, the Breaking of the Prison was Felony in every Case; but now it is not Felony, but where the Party was committed to Prison for Felony. 2 Leon. p. 161. in *Borough and Holcroft's* Case.

See and note the Case of the *King* against *Fell*, the Keeper of *Newgate*: He being indicted for the negligent Escape of one committed to Prison, and charged with High Treason. 1 Salk. 272.

C H A P. XXIV.

What Act of the Sheriffs, Bailiffs, &c. shall amount to false Imprisonment, or not. Pleading by Sheriffs to Actions of Trespas, False Imprisonment, &c. The Rules of Pleading in such Cases. Justification by Mean Process. As to the Warrant, Time, Place, Quæ est eadem transgressio, what it refers to. Traverse of the Time, Place, Pleadings and Justification by Execution; by Process out of an Inferior Court of Record, and how to be pleaded.

What Acts of the Sheriffs, Bailiffs, &c. shall amount to a false Imprisonment, or not.

Arrest after the Writ returned.

IF a Bailiff arrest one after the Writ is returned, false Imprisonment lies.

Precept from illegal Court.

A Precept to arrest from an illegal Court will not save the Officer from an Action of *False Imprisonment*. Hob. p. 61.

Erroneous Process.

Trespas, &c. will not lie against the Sheriff, for executing Process, though it were erroneous. Hob. p. 48. Cox and Barnsly.

Arrest by a wrong Name.

One asks another, if his Name be *J. S.* who said, Yes; on which he arrests him by a Warrant which he had to arrest *J. S.* yet *false Imprisonment* lies. Mo. 457. Coot and Highworth.

Arrest after Superfedeas.

One had a *Capias ad satisfaciendum* delivered to the Sheriff, who made a Warrant to his Bailiff to do Execution: Afterwards a *Superfedeas* was

was awarded and delivered by the Sheriffs to the Defendant, being his Bailiff, who escaped, and the Defendant retook him and detained him in Execution: This second is false Imprisonment; for tho' the first Imprisonment was legal, he having taken him by Virtue of a Warrant made before the *Superfedeas* awarded and delivered, he not having Notice of *Superfedeas* was excusable. But the Detainment in Prison was afterwards a Wrong, for he being the Sheriff's Servant, and by Intendment having Time given him sufficient to take Notice from his Master, ought at his Peril to take Notice thereof. *Cro. El. 918. Prince and Allington.*

Note: By 3 *Mod. Rep.* 325. *Gold versus Strode.*

An Action of False Imprisonment will not lie against a Sheriff or Gaoler for taking the Body by Virtue of a *Capias ad satisfac'* upon an erroneous Judgment: For the Execution is good till avoided by Writ of Error.

The Liberty of a Man is so tender in the Eye of the Law, that a small Thing amounts to false Imprisonment. As in a Case tried at *York Assizes*, one *Robert's Case*.

One in Execution in the County of *Lancaster*, One in desired to be brought to the County of *York* to Execution in *Com'* speak to his Friends; and being there, endeavour-*L. pre-*ed to make his Escape; and the Defendant com-*vailed to*manded to stay him: He was held a principal Im-*be carri-*prisoner, as well as those that laid Hands on him. *ed into* The Defendant pleaded *Not guilty*. Otherwise had the Coun-*ty of Y.* it been had he pleaded Specially, (*viz.*) That the *and there* Prisoner was brought into another County at his *the De-*own Desire. But the Jury honestly gave but 2 *d.* *endant* Damage. *Robert's Case at York Assizes.* *stayed* *If him, &c.*

Sheriff
detains
the Prisoner
after
Notice of
the Debt
paid.

If a Man be in the Hands of the Under-Sheriff in Execution for Debt, and the Debtee tells the Sheriff, that the Prisoner has satisfied him; if the Sheriff release not the Prisoner, it is false Imprisonment to detain one after the Plaintiff hath commanded the Sheriff to deliver him. But this Case is more fully reported in *Bulstrode* 3, 96, 97. *Withers* versus *Henly*, Under-Sheriff.

Plaintiff
tells the
Sheriff,
he had
made a
Release.

A. is in Execution at the Suit of *B.* afterwards *B.* came to the Sheriff, and told him he had made and sealed a Release of the Debt to the Plaintiff, and that therefore he should deliver him out of Execution. The Sheriff doth not so, but after keeps him still in Prison. The Plaintiff brings Action of false Imprisonment: It lies.

Stat. 1 R.
2. ca. 12.

By the *Stat. 1 R. 2. cap. 12.* One being in Execution shall not be suffered to go out of Prison by Mainprise, Bail or Baston, without making Gree to the Parties, unless it be by Writ or other Commandment of the King; and the Detaining him after this, amounts in Law to a new Taking, for the Restraining of his Liberty where he ought to have it, is a Caption in Law. Here the Sheriff ought to take Notice of the Party-Plaintiff, and at whose Suit he is in Custody.

Sheriff
ought to
take No-
tice from
the Plain-
tiff.

Detainer
after-
wards is
false Im-
prison-
ment.

By *Coke*, Detainer after this by the Space of one Hour is false Imprisonment (a Continuance of an Inclosure is a new Nufance). If he would have helped himself here, he ought to have set forth that he knew him not to be the Plaintiff, who told him of the Release. 3 *Bulst.* 96, 97. *Withers* vers. *Henly*, Under-Sheriff. The Case of 20 *H. 7.* 19. differs from this Case, because the Debt of the King was satisfied. 10 *H. fo. 3. a.* 1 *Roll.* 240. *Mesme Case.* *Cro. El.* 379. *Mesme Case.*

It is said in 2 *Keb.* 33. the Party who went with the Sheriff to shew to him where the Goods were shewed (in Execution), the Judgment being set aside after the Goods were shewed, was a Trespasser *ab initio*; but that the Sheriff was not suable nor chargeable. 2 *Keb.* 33. *Turner and Felgate.*

It was agreed in *Olliet and Bessey's Case.* 34 *Where* *Car. 2. B. R.* if one be arrested by Process out of Action an Inferiour Court for a Cause of Action, which does not arise within their Jurisdiction; the Party-levied a Plaintiff may well maintain his Action against Plaintiff him that levied the Plaintiff, or the Officer who wrong-fully, &c. had executed it. *Sir Tho. Jones Rep. p. 214. Olliet* and *Bessey.*

Pleadings by the Sheriff, Bailiffs, Gaolers, &c.

I shall lay down two or three general Rules.

If a Sheriff justifie by Force of a *Capias* to him directed, he shall say he was Sheriff at the Time of the Arrest, as well as at the Receipt of the Writ. Justification at the Time of the Arrest.
35 *H. 6.* 48, 49.

In Trespass, where one justifies as an Officer to do Execution; *De son Tort demesne*, without answering to the Cause, is no Plea. *19 H. 6.* 7. a. *De son tort demesne.*

In false Imprisonment, the Defendant may shew twenty Causes by Way of Justification, and it is not double. 7 *Ed. 4.* 20. *Plowd. Com.* 86. a.

Where the Sheriff justifies by Execution, he must plead that he returned the Writ, *secus* of a Bailiff. *1 Leon. p. 144. Parkes and Mosse.* Return of the Writ.

If a Bailiff justify by Force of a Warrant, he need not say, *hic in Cur' prolat'*; for the Warrant doth not continue in his Hands; but he returns it to the Sheriff. *1 Roll. Rep. 327. Curtis and Dowty.* Warrant.
p. 221. *Bateman's Case.*

Tho'

Though the Proceedings in a Court be irregular, yet if the Court has Power to issue out a *Capias*, by this Warrant the Officer may justifie in false Imprisonment. *Mod. Rep. 173.*

Warrant. If a Bailiff justifie by Reason of a Warrant, he ought to shew the Place where the Warrant was made. It sufficeth if it be shewed in the Rejoinder. 5 *H. 7. 24. Long 5. 101. b.*

Justification by Mean Process.

The immediate Officer must shew the Process returned. The Sheriff ought to return his Writ, otherwise Justification is not good: But it is not so with the Servant.

False Imprisonment was brought against the Sheriff's Bailiff; he justifies by the Sheriff's Warrant on *Latitat*, who arrested the Plaintiff, and required the Defendant to be aiding to him, but pleads not, That the Writ being returned, was executed; yet *per Cur'*, it is good: For the Defendant has no Means to reinforce the Sheriff to make Return thereof. *Cro. Car. 446. Girdling's Case.*

By Process out of an Inferiour Court. In Action of false Imprisonment, the Defendant justified by Process to the Bailiff out of the Court of the Honour of *P.* and does not shew any Process was returned, which (as *Girdling's Case* is) being an immediate Officer, must be shewed; *contra* of an Under-Officer. And altho' he need not shew forth the Letters Patents, yet it must be specially pleaded, such a Court was granted, and that *Virtute, &c. 2 Keb. 256. Haywood and Wood.*

If the Defendant, in Justification of an Arrest, When pleads, That a Bill of *Middlesex* was prosecuted Bill of against the Plaintiff, by which the Sheriff made *Middlesex* and directed a Warrant to arrest him; it shall be ^{shall be intended to be de-} intended that the Bill was delivered to the Sheriff ^{livered.} before the Making of the Warrant, till it be specially shewed to the contrary. In this Case he justifies by Writ to the Sheriff, and Warrant to himself. 1 *Sand.* 299. *Green and Jones.*

The Causes of Demurrer were, because it is not Demur- shewed the Writ was delivered to the Sheriff, rer for nor the Warrant made before the Arrest; and not shew- also for that it is not averred that the Writ was ing Deli- returned. But *non allocatur*, this is no essential Warrant very and Matter, nor traversable: And the Plaintiff might before Arrest. have replied, That the Arrest was before the Delivery of the Writ, else the Court will intend it to be delivered, being said that *Virtute* of a Writ directed to the Sheriff, and Warrant, the Defendant arrested; and the Writ needs not to be returned by a Bailiff Errant. 2 *Keb.* 338. *Mesme Case*, & p. 838, 844.

So in *Scire fac'* on Recovery in Action on the Delivery Case; the Defendant pleads, no *Capias* issued out of *Capias* against *H.* delivered to the Sheriff. Plaintiff replies, to the a *Capias* issued out, and *non est inventus* returned; Sheriff shall be but says nothing of the Delivery to the Sheriff. intended. Defendant demurs, and Judgment *pro Quer'*, for Delivery to the Sheriff shall be intended. 3 *Keb.* 668. *Holmes and Araker*, Bail for *H.*

Note, Upon a Demurrer to a Replication in *Molliter* Assault and Battery and *Faux Imprisonment*, De- *manus im-* fendants justifie by a Precept to arrest, &c. The *posuit no* principal Exception to the Plea was, That the Justifica- tion of Justification of an Arrest by *molliter manus im-* Battery. *posuer'*, was not any Justification of the Battery, and

and the Case of *Stoney and Calvert* was cited. *Hill. 3 W. & M.* which upon a Demurrer was adjudged accordingly by the whole Court. *2 Lutw. 929.*

As to the Time of the Taking out the Writ actually, and the *Teste* of it. The Time when a *Latitat* issued forth is traversable, and may be averred otherwise than according to the *Teste*, *Per totam Curiam*; for a Relation shall not work a Wrong. *2 Keb. 173, 198. Bolton and Johnson.*

If a Man be taken in the Vacation by a Warrant without a Writ, and a *Latitat* be procured, *Teste* in the Term, that *Teste* shall not discharge the Wrong done after the *Teste*, and before the actual Taking out of the Writ; but the Plaintiff may take Issue that he prosecuted truly. But in Trespass and False Imprisonment, the Defendant as Sheriff's Bailiff justified by a *Latitat*, *Teste 27 June, Trin. Term* past.

Writ after the Arrest. The Plaintiff replies, That the said Writ was really and actually prosecuted out of *B. R.* on the 9th of *August*, which was after the Arrest of the Plaintiff.

Shall not prejudice an Under-Bailiff. Defendant demurs: And *per Cur'*, this is an Estoppel, especially in Case of a Bailiff, whose Warrant might be before the Arrest; and all Writs must be *Teste* as of the Term, and the Sheriff's not Returning the Writ, or the not Having any, shall not prejudice his Under-Bailiff.

But Action against the Sheriff. But *per Curiam*, a good Action will lie against the Sheriff or Bailiff of a Franchise in this Case.

But in *Plunket and Green's Case*, in the same Reporter.

Econtra. In Trespass and False Imprisonment against the Sheriff and Bailiff, the Defendant justified by Warrant on Writ to the Sheriff, as *Long and Bolton's Case*. The Plaintiff replies, No Writ was then taken out. Defendant demurs, and Judgment *pro Quer'*;

Quer'; for though the Bailiff hath a Warrant, yet he is liable if there be no Writ; *contra*, if the Writ be void and delivered. 2 *Keb.* 705. *Plunket* and *Green*. Warrant and no Writ.

And in *Bennet* and *Filkin's* Case, *Trespass* and *Antedate* *False Imprisonment*, the Defendant justifies by Arrest on *Latitat*. Plaintiff replies, The Writ was taken out after the Arrest. Defendant demurs. *Per Cur'*, the Antedate of the Writ will not suffice, if the Proceeding be after. And Judgment *pro Quer'*. 3 *Keb.* *Chancy* and *Rutter*. will not suffice.

And as to Pleading as to the Time, *Richardson* and *Pricket's* Case is to be observed. The Plaintiff supposed the Arrest and Imprisonment to be 10 *Decemb.* 29 *Eliz.* Defendant pleads, by Virtue of a Warrant from the Sheriff he did arrest and imprison him the second and third Day of *December* before; *absque hoc* that he was guilty before or after, &c. Plaintiff replies, he was Guilty of the *Trespass*, &c. after the third Day of *December*, *prout in narratione sua specificatur*, and Issue upon this, and well enough; though he saith, only he was guilty after the third Day; but saith not, and before the Action brought. For when it is said, He was Guilty after the third Day, &c. *pro-ut*, &c. it is to be intended to be the third Day, and the Day of which he counted. *Cro. Eliz.* 95. *Richardson* and *Pricket*. Traverse that he was guilty before or after, &c. Repl. That he was Guilty after.

To all the Imprisonment, but eleven Hours, the Defendant pleads, *Not guilty*; and to the Imprisonment for eleven Hours he justifies as Sheriff, for that the Plaintiff hindered him in the Execution of his Office, and said nothing to the *Vi & armis*, yet good. 1 *Sand.* 78. But this Case went further. 2 *Keb.* 237. The *Trespass* and false Imprisonment was laid the first of *April*; the Defendant justifies at another Day at *Warw.* as Sheriff, *absque hoc*, That he was Guilty the first of *April*, or at any Time Non culpa to Parr, and justifies as Sheriff for the Residue without saying to the vi & armis.

D d

before

before or after, while he was Sheriff, or at any other Place. *Per Cur'*, This Traverse is sufficient, and the Plaintiff must reply and shew, if there were any other Assault or Imprisonment. Also the Traversing the Time before and after, doth not lock up the Plaintiff from assigning another Day and Place, especially the Thing being local. *1 Sand. 78. 2 Keb. 237. Low and King.*

Time, *quæ est eadem Transgres.* Justification in false Imprisonment by a Writ of *Supplicavit de bono gestu* out of Chancery, and arresting him by the Sheriff's Warrant thereupon. The Justification being by an Act in the same County, and justifying all the Time in the Declaration, tho' it do not agree with it in the Day, but concludes *quæ est eadem Transgressio*, is good enough, the Day not being material; and the Replication is not good if it vary from the Day in the Declaration. *Cro. Car. 228. Tyler and Wall.*

The Case. The Case was: Trespass, &c. *ultimo die Octob. 6 Car.* and detaining him in Prison for two Days. Defendant justifies, because *13 Aug. 6 Car.* a Writ of *Supplicavit* issued, and by Warrant from the Sheriff to the Defendant, he arrested the Plaintiff *21 Sept.* and detained him two Days, &c. *quæ est eadem Transgressio, &c.*

Place, *quæ est eadem Transgres.* In false Imprisonment in London versus W. Defendant justifies in Norfolk, by Force of a Warrant to the Sheriff *quæ est eadem Transgressio, absque hoc* that he is Guilty in London. Plaintiff demurs generally.

Traverse double. 1. Because the Plea is double; for the Justification in Norfolk, *quæ est eadem Transgressio*, had been sufficient without more, and then the Traverse makes it double. But *per Cur'*, you shall not take Advantage of this upon a General Demurrer. *1 Roll. Rep. 221. Bateman and Woodcock.*

General Demurrer.

2. He justifies by Warrant, and saith not, *Hic Warrant in Curia prolat'*. *Per Cur'*, They need not shew *hic in Cur'* this to be in Court, for it appears to be executed, and *prolat'* that the Warrant is returned to the Sheriff. And so for this last Point is 1 *Roll. Rep.* 327. *Curtis* and *Dowry's* Case.

Trespass in *London*; Defendant justifies by a *Trespass in London*, Warrant in the County of *N. quæ est eadem Trans-* Justifica-
gres. &c. and traverseth, that he is Guilty in *Lon-* tion in
don, vel alibi extra Com' N. and good. 2 *Cro.* 372. *Com' N.*

If the Defendant in *Trespass* justifie the same Where Day and Place, it is not necessary to say, *Quæ est Quæ est eadem, &c.* 1 *Bulst.* 138. *Kel.* 27, 29. *eadem* is not neces-
 sary.

False Imprisonment by a Woman; the Defen-
 dant saith, that she was carried to *Southwark* by her Consent, which is the same Imprisonment; Upon and this is no Plea, for Imprisonment is against the false Im-
 Will of one, and that is not so. 14 *H.* 6. 2. prison-
 ment, De-
 fendant pleads Plaintiff's Consent.

So in *Assault, Battery and Wounding*; the De- That mol-
 fendant saith, That he laid his Hands upon the liter ma-
 Plaintiff peaceably, and arrested the Plaintiff the nus impo-
 same Day; which is the same *Assault, Battery and* suit, and
Wounding, and held it was no Plea for the Reason him, arrested
 aforesaid. 21 *H.* 7. 49.

Yet in *False Imprisonment*, the Defendant ju- That he
 stifies as Sheriff, that he arrested the Plaintiff by a arrested
Capias; and it is good, if he say, It is the same him by a
Trespass, otherwise not. 22 *E.* 4. *Bro. False Im-* *Capias,*
prisonment 29. *quæ est eadem.*

In *False Imprisonment*, the Defendant justifies Justifica-
 (as Sheriff) the Taking the Plaintiff by Force of tion local.
 a *Capias* directed to him at *D.* within his County of *G.* where the Plaintiff declares of an *Imprisonment* in another County; there the Traverse of the County is good. For the Defendant
 D d 2 cannot

cannot take the Plaintiff by Force of the said Process in any other County than where he is Sheriff, and so the Justification is local. 3 Leon. 97. in *Partridge and Pool's Case*.

Justification.

The Defendant justifies the Arrest *quousque* Bond given to appear in *B. R. absque hoc*, that at any Time he did arrest without reasonable Cause, until he gave such Bond. Plaintiff demurs generally. *Per Cur'*, The Justification is good, and the Plaintiff should have traversed *absque hoc* that he was arrested, and detained till Obligation to appear in *B. R.* 3 Keb. 165. *Dawson and Rawlinson*,

De injuria sua propria False Imprisonment; Defendant justifies by Arrest, by Virtue of a Warrant of the Sheriff on a *Latitat*. The Plaintiff replies, *De injuria sua propria absque tali causa*. This is naught upon Demurrer, being Matter of Record; but Issue being taken upon it, and being in the Affirmative, it is a *Jeofail*, and good after Verdict. Judgment *pro Quer'*. 1 Keb. 125, 164. *Beesley and Walker*. So *Osborn and Brook's Case*.

Matter of Record, &c. put into one Issue, ill.

The Defendant justified by a Writ sued out of *B. R.* to *Vic' Devon'*, and Warrant and Arrest thereupon at *D. &c.* Repl. *De injuria absque tali causa*. Defendant demurred generally, and Judgment for him; for it is ill upon a General Demurrer to put Matter of Record and Fact, and Variety of Matters, in one Issue, as the Warrant, Arrest, &c. 3 Lev. 65.

The Defendant justifies in False Imprisonment, because a Writ of *Vi Laica removenda* came to the Sheriff to remove the Force. The Plea need not say, they found him *resistentem in ea parte*.

Precedent.

Traverse, That the Defendant was in Custody by Force of a Warrant made upon one Writ, and not by Warrant upon another. 1 Sand. 19. Traverse of the Warrant.

Pleading by the Sheriff's Bailiffs.

Justification in Trespass, Trover &c.

On Execution.

Where the Sheriff justifies by Execution, he must plead, That he returned the Writ. *Secus* if a Bailiff. 1 Leon. 134. Parkes and Mosse. Sheriff must plead Return of the Writ.

In Trover of 300 Sheep, 1 Dec. 36 El. Defendant pleads, That he was Sheriff of Com' Linc', and that J. S. recovered against the Plaintiff 100 l. and upon that a *Fieri facias*, which Writ was returnable *Crastin' Animar'*, 35 Eliz. that this was delivered to him 1 Octob', 30 El. that he on the 20th of Octob. took the said 300 Sheep, and on the 22 Octob' sold 104 Sheep for 40 l. and that the other 196 Sheep remained *pro defectu emptorum*; and at the same Day of *Crastin' Animar'* he returned the said Writ, and all this Matter, the which is the same Conversion, *absque hoc* that he converted them *aliter vel alio modo*. *Per Cur'*, The Plea is insufficient: Sheriff justifies in Trover. But no Conversion confessed.

1. Because by his Plea he doth not confess any Conversion, and then the Traverse is ill. He ought upon this Matter to have pleaded *Not guilty*, and given it in Evidence.

2. Because the Declaration supposeth the Trover and Conversion to be the first of December, 36 El. and he justifies the Conversion in Octob', 35 El. so he meets not with the Plaintiff in Time, and therefore

therefore he ought to have traversed it, and the Traverse *aliter vel alio modo* shall never answer to the Time, but to the Manner of the Conversion.

3. He makes not any Justification for four of the Sheep, but that he seized them; but he shews not what he did with them. *Cro. El. 433. Ascue and Sanderson.*

Justifica-
tion to
prevent
rescuing
of Goods

In an Action of Battery the Defendant justifies by Command of the Bailiffs to prevent rescuing Goods seized on Execution. Repl. *De injur' sua propr'*, and traverses the Command of the Bailiffs. Defendant demurs generally: Resolved that the Repl. and Traverse was ill, for he might do it of his own Traverse. Accord to prevent a Breach of the Peace.

Traverse
ill, and
also Plea
ill for
want of a
Traverse.

But it was also said, That the Defendant's Plea was ill; because the Action being of a Battery at *D.* and the Justification at *S.* in the same County, and the Bailiffs had Authority thro' the whole County, and so the Justification not Local; and therefore he ought to have justified in the same Place. And if the Place had been material, he ought to have traversed all other Places within the said County: Wherefore Judgment was given for the Plaintiff. *Vide 3 Levinz. 113.*

Traverse
of Virtute
cujus, &c.

Upon a Justification (for an Escape) by a *Habeas Corpus virtute cujus*, &c. The Plaintiff in his Replication traversed the *Virtute cujus*, and the Chief Justice was of Opinion, That the Traverse was ill, being, as alledged, of Matter in Law; but the other three Justices were of a contrary Opinion. The Plaintiff had Judgment. *1 Lutw. 632.*

Traverse
absque
Warranto.

Traverse in Repl. *De injuria sua propr' absque absque talitali Warranto. Et hoc pet' qd' inquiratur per Pa-Warranto. triam.* Exception, That it ought to have been *absque hoc* that there was such a Warrant, and not

as above; but the Court inclined it was good notwithstanding. 2 Lut. 1460, &c.

Scire fac. upon a Judgment in Debt. Defendant pleads a *Fieri fac.* directed to the Sheriff of Sheriff le-
L. for levying the Debt, and he by Force of it vied the
took divers Sheep of the Defendant's for the Debt, a
and yet detains them. *Per Cur.*, It is a good Plea, good Plea.
altho' he do not alledge that the Writ is returned;
and altho' the Writ is conditional, *Ita quod habe-*
as denarios, &c. for the Plaintiff hath Remedy a-
gainst the Sheriff, and the Execution is lawful,
which the Defendant cannot resist. So *Rook's*
Case. *Vide antea.*

If in False Imprisonment the Defendant justifies Where
by a *Capias* of the Sheriff, and a Warrant of the *De injuria*
Sheriff to himself; there *De injuria sua propria* is not a
generally is not a good Plea, because a Matter of good
Record is Parcel of the Cause; But there he ought Plea.
to say, *De injuria sua propria*, and traverſe the
Warrant, which is Matter *en fait*. 8 Rep. *Cro-*
gat's Case.

D. brought Action of Assault, Battery and Im-Executi-
prisonment of his Wife, against W. and W. in C. B. on against
Defendants plead a Special Justification, (*viz.*) a Feme
That in Nov. 2 Jac. Action of Trespass was in her
brought by A. against Julian G. and on Ge- Name
neral Issue found for Julian G. and Judgment sole, her
for her; and afterwards, and before Execution, first
Julian G. marries the Plaintiff D. and afterwards Name be-
Writ of Error was brought in B. R. and upon a ing con-
Scire facias against the said Julian; Judgment in all Pro-
C. B. was reversed; and afterwards *Ca. sa.* was continued in
directed to W. and W. the Sheriff, to take the said Error.
Julian G. and they took her; with an Aver- *Ca. Sa.*
ment, That the said Julian G. and the Wife of Aver-
the now Plaintiff, was one and the same Per- men;
son.

Demur-
rer.

Plaintiff demurs; because when the Warrant is against *Julian G.* there is no such *Julian G.* for by her Marriage with the Plaintiff she had another Name, and his Averment cannot help him, because it agrees not with his Warrant: But *aliter*, had the Variance been in the Name of Baptism only.

But *per Cur'*, the *Scire facias* was according to the Judgment in the *C. B.* and well then might all the subsequent Process be so: But if the Husband had come upon the *Scire facias*, and shewed how that she was Covert, then the Action ought to be against both of them. And,

Admit-
tance.

2. The Parties themselves in all the Proceedings throughout, have all admitted that she is the same Person, and had the same Name, and they shall be concluded from saying the contrary. And tho' the Sheriff had shewed the Marriage, this was but a bare Allegation and Suggestion of the Sheriff; and it appears not whether it were judicially so or not.

A bare
Allegati-
on ill.

3. It would be dangerous for the Sheriff to return a *Non est inventus*; for because the Parties have all admitted her Name to be so in all Proceedings, the Sheriff shall be *estopped* also. 3 *H. 7. 10.* and then Action on the Case would lie on the false Return, if the Woman should be in the Company of the Sheriff, and the Party shew her to the Sheriff, and she escape. 1 *Brownl. 226. Doyley and Webb. 2 Bulstrode 80. mesme Case.*

Estoppel.

Variance
in the
Time of
taking
from the
Time in
the Narr.

In Trespass for taking Goods, Defendant pleads a Recovery in the Court of *Dorchester*, in Debt against the Plaintiff, and Execution upon this by *Fieri fac'*, and justifies the Taking, Appraising and Sale (by Consent) of the Plaintiff, in Part of the Satisfaction of the Judgment recovered, *Qua est eadem captio.* Plaintiff demurs; because the De-

fen-

Defendant varying in the Time of the Taking from the Time alledged in the Declaration, he ought to traverse any other Taking; for the same Goods may be taken at several Times, and the *Quæ est eadem captio* is not sufficient; as *Marshall* and *Dicken's Case*. Sir *Tho. Jones* p. 146. *Allen and Chamming*.

But *per Cur'* the Averment sufficeth. *Keil*. 27. 1 *Bulstr.* 138. *Cro. Car.* 228.

Justification in Trespass, Assault and Battery, by By Process out of an inferiour Court of Record, is not good without shewing whether the Court was of Inferiour holden by Charter or Prescription. Sir *Tho. Jones* p. 165. *Swode and Deering*. Court.

In Trespass of Battery, the Defendant justifies Battery by Process to arrest one *Wood*, and the Plaintiff would have rescued him; whereupon he did *moliter manus imponere*.

The Plaintiff replied, *De injuria sua propria*, *De injuria absque hoc* that the Defendant had *Virtute* of such a Warrant taken, as that by which the Defendant justified. Defendant demurs. *Per Cur'*, The Justification is sufficient, and better by the Admittance of the Replication, than if the Issue had been offered *De injuria sua propria* generally without such Traverse. 2 *Keb.* 293. *Haywood and Wood*.

In Trespass and Imprisonment, the Defendant justifies by a *Capias*, and that the Plaintiff did afterwards escape, and he being Bailiff, did follow him by Virtue of the same Warrant taken out upon the *Capias*. That which is confessed and avoided, not to be traversed.

Plaintiff replies, He escaped by the Licence of the Sheriff, and traverseth the later Taking by Virtue of the Warrant. *Per Cur'*, The Traverse is idle, because the Plaintiff had sufficiently confessed

Of Justification by Sheriffs

fessed and avoided; and if he escaped by the Sheriff's Licence, that ought to be the Thing put in Issue, and not the Traverse. 1 Brownl. 197. Hatton and Hunn.

Not
shewn
from
what
Court the
Cap. issued.

Justifica-
tion by
Writ De
Homine re-
plegiando.

Upon a Justification by a Sheriff's Warrant held the Bar was ill, for that it was not shewn out of what Court the *Capias* issued; and for that the Plaintiff had Judgment. 2 Lutw. 1460. &c.

In Trespass against Two for Assault and Battery, and Menaces, &c. and breaking open his Dwelling-house, &c. One of the Defendants justifies by Virtue of a Writ *De Homine replegiando W. L.* and a Warrant delivered to the other from the Sheriff for that Purpose, in whose Aid he entered, the Door being open, and the Plaintiff assaulted him; whereupon *molliter manus imposuit*, &c. the other Defendant imparls.

Oyer of
Warrant.

Repl. and
traverse
the Com-
mand.

Then the Plaintiff prays Oyer of the Sheriff's Warrant, which appears to be directed to all his Bailiffs, and then replies *De injuria sua propria*, and traverses, That the first Defendant entered by Command of the other Defendant; and the Defendant rejoins, that he entered, &c. by Command of the other, and then tenders Issue thereon; and the Plaintiff demurs specially. 2 Lut. 1428, 1432.

Judic' pro
Quer' for
want of
Aver-
ment.

Judgment was given for the Plaintiff; and it seems chiefly for the Defect of not averring, That *W. L.* that was to be replevied, was in the Plaintiff's House at the Time of the Entry made, &c. and the Reporter sets forth several Cases to that Purpose.

The Rea-
son.

And as to an Exception, That the Writ *De Homine replegiando* was conditional, as *Nisi captus fuit per speciale mandatum Domini Regis*, &c. The Defendant, he says, ought also to have averred, That *W. L.* was not taken by any Special Mandate, &c.

And

And the Reporter further adds, That being in some Doubt as to this Matter, he made what Search he could, but found not in any Book, any Justification by Virtue *De Homine replegiando*, or any Authority concerning it. But for further Information touching the Learning of *Homine Replegiando's*, *Capias's* in *Withernam*, with *Supersedeas's* *Repleg.* and Bail thereon, see the Cases of the King versus Lord Gray; and that of *Turbet* and *Dassigneg.* 2 *Show.* 218, 221. See also my Treatise of *Replevins.* 17, 29, &c.

For the Return of a Writ *De Homine replegiando*, For *Revide Dalt.* 258, 556. *Kitch.* 262. *b. Thes. Brev.* turns of 140. *New Ret. Brev.* 329, 330. 2 *Show.* 226, 230. such

Upon a Justification by an Attachment of Goods and Demurrer. *Vide* 2 *Latw.* 1456, &c. That if a Trespass be alledged the 10th of November, and the Justification is the 11th, *Qua est eadem Transgressio*, That the Plea is good without any Traverse.

That altho' the Plea was sufficient in Matter of Substance, yet the Addition of the Traverse, That they are guilty *aliter vel alio modo*, (altho' meer verse ill. Surplusage) being specially shewn for Causes of Demurrer, had made it ill. *Moor* 864. 1 *Sand.* 312.

That an Attachment of such a Number of Goods is not justifiable; and said, That one single Thing alone might be attached; and by the Chief Justice, That there ought to be a reasonable Distress to make the Defendant appear.

That it did not appear that the Sheriffs, before whom the Courts were held, had any Authority to hold them; and for these Reasons, Judgment was for the Plaintiff.

See the Judges Opinions, 2 *Vent.* 92. upon a Special Demurrer, That the Traverse ought to have been omitted out of the Defendant's Plea, who justified in Trespass (for impounding Plaintiff's appraising and detaining them till Plaintiff paid the Money to the Use of the Sheriff.

Cattle, *quousque finem fecit* of 10*l.*) by Virtue of a *Fieri fac'* for 10*l.* Debt. and 40*s.* for Costs, &c. upon the Sheriff's Warrant, whereby he took the Plaintiff's Cattle in Execution, and caused them to be appraised, and kept them in Custody until the Plaintiff paid the Execution-Money; and traverses that he is guilty before or after. By the Chief Justice and R. the Justification should have been, till he paid the Money to the Use of the Plaintiff, and not to the Use of the Sheriff; and no Authority in Law to deliver Goods back upon Payment of Part of the Money, it seems the Goods ought to have been sold, &c. 1 Cro. 404, 504, 584. 2 Cro. 246. Judgment *pro Quer'*.

C H A P. XXV.

Of Attachments against the Sheriff; where and in what Cases it lies, or not. And where against him for a Thing done out of his Office, Attachment of Money in the Shiriff's Hands. Of Attachments against others, and against the Goods, and the Return. Of Amerciaments, where and in what Cases the Sheriff is to be amerced.

Of Attachments against the Sheriff, where and in what Cases it lies, or not.

A Attachment shall not be granted against the High-Sheriff, for the Contempt of his Bailiff. *March p. 54. Vide post 410.*

Attachment against the Sheriff for a frivolous Return of an *Habeas Corpus*. The Return was, that the Committee for poor Prisoners ordered he should not bring the Body till they had consulted with the Lords Chief Justices, and an *alias Habeas Corpus*, under Pain of 80 l. *Stile's Rep. 422. Pract. Reg. 55.*

Attachment against a Sheriff for refusing to bring Money into Court, which he had levied upon an Execution. *Pract. 55.*

Attachment lies by the Rules of the King's Bench, for not making a Return of *Habeas Corpus* upon a *pluries Habeas Corpus* issued forth. *Pract. Reg. Tit. Attachment.*

Attachment lies against a Bailiff, for executing a Process of this Court against a Rule of the Court, having Notice. *Pract. Reg. 56.*

the Rule of Court,

It

Against a Sheriff, when he was out of his Office, for a Misdemeanor in his Office. *Capias* was delivered to the Sheriff against *J. S.* and the Plaintiff shews him to the Sheriff, and he saw him; but he turned about and said, I cannot see him, and after returns *Non est inventus*, and then his Office determined. *Dodderidge* and *Jones* granted an Attachment against him, though he was out of his Office, for this Contempt during his Office. *Latch*, p. 176. and p. 217. *Dixon's Case*. But they Two denied an Attachment against a late Sheriff, for returning *Non invenit emptores*, and then his Office determines, and he detained the Goods in his Hands. *Vide antea*, and *Pract. Reg.* 587. See after amongst the several Actions upon the Case against Sheriffs, &c. in this Chapter.

No attachment of Money in the Sheriff's Hands. Note, Attachment of Money in the Sheriff's Hand is void, for the Sheriff at the Return of the Writ ought to answer for the Money. 1 *Leon.* p. 264.

Attachment against others.

Attachment is a Non omittas. An Attachment against a Man is a *non omittas* in it self, and the Sheriff may break his House to take him, for the Writ is for his Person. 1 *Roll. Rep.* 339. *Brigg's Case*.

What the Sheriff ought to return. If the Party Defendant be attached, or distrained by Process out of any Court of Record, or County, by Force of a *Justice's*, &c. Hundred-Court, or any Court-Baron, and make Default, the Goods or Issues are forfeited, and upon the Attachment the Sheriff or other Officer may take the Goods with them. * And this is the Reason, that upon the Attachment the Sheriff or other Officer ought to return the Certainty of the Goods and the Value; and it is not sufficient to return, that

* On Attachment.

that he hath attached or distrained the Defendant by Goods to such a Value, and so upon the Distress, the Issues must be returned in Certain, because they are upon Default to be forfeited. *Vide supra Tit. Original Process. 3 Inst. 228.*

The Sheriff is to bring an Attachment upon the *Ne exeat* Writ of *Ne exeat regnum* until he finds Sureties, *Regum. i Roll. Rep. 313.*

Where and in what Cases the Sheriff is to be amerced.

The Sheriff is to be amerced for the Faults of his Special Bailiffs, for the Sheriff is the Officer to return *Quod Mandavi ballivo, &c. qui respondit, &c.* if the Return is sufficient, and a Default is for not doing according to the Return, the Bailiff shall be amerced, and not the Sheriff. As if the Sheriff return *Quod Mandavi ballivo Libertatis, &c. qui respondit quod cepit J. S.* according to the Writ, and he shall be here at the Day; if he bring him not at the Day, the Bailiff shall be amerced, and not the Sheriff. But if the Chamberlain of the County Palatine of Chester makes an insufficient Return to the Court of Common Pleas, upon a Writ issued out of that Court, the Sheriff shall be amerced, because he is the Officer responsible to the Court. Now in *Palmer and Marshe's Case, i Brownl. 36.* If the Sheriff return *Quod Mandavit ballivo Libertatis qui sic respondit*, and return an insufficient Return in Law, the Sheriff shall be amerced; for he might have returned *Ballivus nullum responsum dedit.* * If the Sheriff return *Feci retornum istius brevis G. & L. ballivis Libertatis G. qui habent retornum brevium & Executionem eorundem, qui mihi responderunt; quod istud mandatum adeo tarde receperunt per manus*

For the Faults of his Special Bailiffs.

Where the Bailiff shall be amerced, and not the Sheriff.

* Amerced for the Return of the Bailiff of a Liberty.

nus Attornat' sequentis quod nihil inde facere poruerunt; the Sheriff shall be amerced for his Return, for he ought to have returned it to the Bailiff time enough for them to serve it. *Trin. 39 Eliz. B. R. Palmer and Marsh, 1 Ed. 1. 13. b.*

Where

Bailiff of a Liberty, the Sheriff shall be amerced. As in a Liberty *Præcipe quod reddat*, if at the grand Cape the Sheriff made no Return.

If no Return be made for Part by a Bailiff of a Liberty, the Sheriff shall be amerced. As in a Liberty *Præcipe quod reddat*, if at the grand Cape the Sheriff return *Quod Mandavit* J. Bailiff of a Franchise, &c. who returned, that he had taken the Land into the King's Hand; and speaks nothing that he hath summoned the Tenant as the Writ commands him; the Sheriff in this Case shall be amerced, for that no Return is made of Part. 4 H. 6. 25. b.

Bailiff of Liberty amerced.

By the Statute of 27 H. 8. 24. Amerciaments for insufficient Returns of Writs made by Bailiffs of Liberties, shall be set upon the Heads of such Bailiffs, and not upon the Sheriff, nor upon the Lord of the Franchise.

Increase of Amerciaments.

If the Sheriff be amerced by the Court for the not doing a Thing belonging to his Office; and yet he continues to neglect to do it contrary to the Rule of the Court, the Court may increase the Amerciaments till he do his Duty therein. But Amerciaments set upon the Sheriff upon the Motion of the Party, if they be not estreated into the *Exchequer*, may be with a *Respectuar'* (that is, be respited) if the Party grieved who caused him to be amerced will consent thereunto, otherwise not. *Pract. Reg. p. 58, 59.*

Amerciament estreated with a *Respectuar'*.

Amerciament for not Return.

If upon a *Latitat* the Sheriff do return a *Cepi Corpus*, and the Party arrested on this Process doth not appear at the Day of the Return, the Sheriff may be amerced by the Court; yet tho' the Sheriff be amerced, if the Party arrested do appear within a Week after the Day he ought to have appear-

appeared, the Amerciament may be taken off the Sheriff. *Pract. Reg.* 58.

If a Debt be levied by *Fieri fac* and delivered For not to the Plaintiff, and the Writ is not returned, yet returning the Execution and Sale is good, but the Sheriff *Fi fa*. shall be amerced for the *Non-Return* of the Writ. 5 *Rep. Hoe's Case*.

It was moved to have the Sheriff amerced for Not for returning too small Issues: Coke said we cannot do returning so, for (saith he) it doth not lie in our Conisance, too small whether they are too small or not, but you are put Issues. to your Action. 1 *Roll, Rep.* 339. *Goates's Case*.

But see the following Page, *contra*.

A Bishop shall be amerced, for an Escape, 100 *l.* Amercia-
a Gaoler shall be amerced, for a negligent Escape Escape of
of a Person Attaint, 100 *l.* and if one Convict 5 *l.* Persons
2 *Inst.* 28. *Q.* convict.

An *Exigent* which was delivered of Record (to For imbe-
the Sheriff) was imbezilled, and the Copy there- zilling a
of was returned by the Sheriff, and he was amer- Record.
ced for the Return of the Copy at 30 *l.* and for im-
bezilling the *Exigent* at 20 *l.* 5 *H.* 4. 5.

See after, amongst the Actions on the Case a- *Note.*
gainst Sheriffs, &c.

Amerciaments, see further of Fines, &c. 1 *Salk.*
14, 54, 55, 56. 1 *D'anv.* 457, 458, &c.

C H A P. XXVI.

*Remedy against Sheriffs, Bailiffs, &c. for Male-Fea-
sance. As imbezilling an Exigent, for entring in-
to a Corporation which had Retorna Brevium.
For not delivering a Superseas to the new She-
riff. For concealing or subtracting a Writ. For
refusing sufficient Bail, and forcing to find extra-
ordinary Bail. For taking sufficient Bail. For
not bringing Money levied by Fieri fac' into Court.
And Statute of Limitations pleaded.*

Remedy against Sheriffs, &c.

Quashing **I**F the Sheriff in his Court quash an *Essoin* er-
an Essoin. roneously, without the Consent of the Suitors;
Action on the Case lies against him, for the Party
cannot have his false Judgment on this, 26 *Affize*
45.

Returns
Trop petit
Issues.

If a *Distringas* issues to the Sheriff to distrain
the Defendant in the Action by all his Lands and
Chattels, &c. and the Sheriff returns *Trop petit*
Issues (too small Issues): Although an Averment
lies by the Stat. of *W. 2. c. 43.* yet the Plaintiff
may well have his Action on the Case against the
Sheriff, because it appeareth by the Words of the
Statute that this is a false Return, and the Words
are, *Quod Distrinxerit*, by all his Lands and Chat-
tels, *Ita quod de exitibus eorum*, &c. so that if
he does not return all the Issues, he does not as he
is commanded, The Statute ordains, that the King
shall have the Issues, but restrains not any Remedy
that the Plaintiff had at Common Law. 3 *Car. 1.*
Dorothy Bennet against the Sheriff of London,
2 *Inst.* 449. *Bro. Dam.* 69. 8 *H.6.* 12.

**For imbe-
zilling an**
Exigent.

If the Sheriff imbezil an *Exigent* delivered to
him at my Suit, Action on the Case lies *Tam*
pro

pro Dom' Rege quam pro meipso. 41 Affize 12. Fitz. Bill 14.

So it lies against a Sheriff, though the Sheriff delivered the Writ to one of the Coroners, and he was robbed thereof by another of them who was named in the *Exigent*, if he was before in the Custody of the Sheriff, and he suffered him to go at Large, for this was his own Folly. *Fitz. Bill.*

14. *Br. Act. sur le Case 121. Br. Bar. 68.*

And if a Writ be substracted by a Sheriff's Deputy, it is said the Deputy himself may be punished. 1 *Leon. 146. Cro. Eliz. 175. 1 Roll. Rep. 75.*

A Knight for the County brought Action against the Sheriff for not levying 10 l. 4 s. for his Expences in Attendance in Parliament. 17 *Ed. 3. B. R. Rot.*

The Sheriff was punished in the *Star-Chamber*, for neglecting to execute a *Capias Utlagat'* after Judgment. *Hob. 244.*

Action on the Case lies against a Sheriff, for entering a Corporation which had *Retorna Brevium*. 1 *Roll. Rep. 118, 119.* The Town of *Darby* vers. *Foxhen.*

J. S. recovered a Debt against *Calthrop* and procured a Writ of Execution to *W. P.* Sheriff of *D.* but before the Writ was executed, *Calthrop* procured a *Supersedeas* to the said *P.* who, when his Time was out, delivered all the Writs to the new Sheriff, but not this *Supersedeas*; so that *J. S.* procures a new Writ of Execution to the new Sheriff, upon which 18 of *Calthrop's* Beasts were taken. And he brings his Action against *P.* for not delivering over the *Supersedeas*. By the Prothonotaries, the Course is to take a new Writ to the new Sheriff. But the Court inclined that the Action lay; for the Writ to the old Sheriff is, *Quod comitat' pred' una cum brevibus retulis memorandis*

The Office and Duty of Sheriffs, &c.

& omnibus officium illud tangen'. And an Action will lie for not delivering some Writs to the new Sheriff, which is not returned, &c. as Estrepmont, *Mod. Rep.* 222, *Calthrop* and *Phillips*.

For the Plaintiff upon a Rescue.

He at whose Suit the Party arrested rescues himself, and escapes from a 'Special Bailiff or Bailiff Errant, shall have Action against the Sheriff only, *Vide Tit. Under-Sheriff, Atterton* and *Harwood*.

For concealing a Writ.

Warrant on *Fieri fac'* is directed to the Under-Sheriff of a Liberty, and he levies the Debt, but conceals the Writ; Action on the Case lies against him. *M.* 12 *Fac.* *B. R. Bell* and *Satesby*.

Sheriff's Deputy for substracting a Writ.

If the Sheriff's Deputy substracts a Writ which is to be returned, Action lies against the Sheriff. And yet the Deputy may be punished for this Falstity by Deceit. 19 *H.* 6. 71. *b.* But *Vide antea*, where this is said not to be Law against the Sheriff. 1 *Leon.* 146, &c.

Bailiff of Liberty chargeable for his Servant.

Servant of a Bailiff of a Franchise, sworn by Deputation to serve Proceſs but of such a Sum, and he serves Proceſs of a greater Sum without Warrant, and levies the Money, and parts with it, the Bailiff shall be chargeable. *Hetley p.* 12.

For not discharging a Prisoner without paying Action-Money.

Sir *John Lenthall* (his Prisoner having agreed with his Creditors) would not discharge him without paying to him Action-Money: By *Glyn, S.* 7. there are two Remedies against him, Action of false Imprisonment, or Indictment for Extortion. Fees must be paid and no more. *Stile's Rep.* 454. *Welberly* and *Sir John Lenthall*,
Vid. Tit. Fees.

But Bailiff of a Liberty is not chargeable for the Gaoler. *Vide supra.*

As for what Remedy there is against the Sheriff for refusing sufficient Bail, the Law stands thus:

If a Sheriff or a Mayor refuse sufficient Bail ^{For refusing sufficient Bail.} against the Statute of 23 H. 6. c. 10. by which the Penalty of 40*l.* is given, one Moiety to the King, and the other to the Party who will sue for it. In this Case no Action lies by Bill in the *King's Bench* ^{By Information, or} against the Sheriff, &c. Because the Statute of 18 Eliz. is, *That no Person shall sue any Penal Statute Original. but by Information or original Action, and not otherwise.*

But Note, It is not limited by the Statute of 23 H. 6. c. 10. how the Penalty shall be recovered, ^{Tho' not limited by the Statute.} but generally that he shall forfeit 40*l.* one Moiety to the King, and the other to him that sues, 3 Inst. 194. 6 Rep. 17. *Gregorie's Case*, 1 Roll. Abr. 537. *Widifon and Clerk*.

Action on the Case doth not lie against a Sheriff, ^{For taking insufficient Bail.} for suffering a Prisoner to go at Large, upon the taking insufficient Bail. *Vide supra, Pasch. 2 Jac.* C. B. in the Case of the Lady *Mounson* against the Sheriff of *Lincoln*, for taking insufficient Security upon the Statute of 23 H. 6. It was adjudged, ^{Death of one of the Sheriffs.} that the Death of one of the Sheriffs did not abate one of the Writ. 2 Sanders. 5. *Postern and Hanson*, *Hutton* p. 120. *Metcalf and Hodifon* p. 77. *Trevor and Michelbourn*, 1 Keb. 56. *Stalford and Bateman*.

Action on the Case lies against the Sheriff, for ^{Action of the Case} that he levied such a Sum of Money on a *Fieri fac'* at the Suit of the Plaintiff, and brought not ^{against the Sheriff for not bringing} the Money into the Court at the Day of the Return.

ing Money levied into Court.

The Office and Duty of Sheriffs, &c.

The Defendant pleaded the Statute of Limitations 21 *Jac.* it is Ill. An *Indebitatus Assumpsit* would lie against the Sheriff in this Case, or against his Executors, and then the Statute might be pleaded. If the *Fieri fac'* had been returned, the Action would have been grounded upon the Record, and it is the Sheriff's Fault that the Writ is not returned: But however, *per Cur'*, the Judgment in this Court is the Foundation of the Action. And so Judgment *pro Quer.* that it is not within the Statute of Limitations. *Mod. Rep.* 24.

Concealing *Fi'fa'*. Action on the Case against a Bailiff for concealing a *Fieri fac'*, after he had levied the Money upon it. 1 *Roll. Rep.* 78.

One is arrested for 600 *l.* and forced to find extraordinary Bail. Action on the Case lies.

Some other Matters relating to SHERIFFS.

Actions upon the Case against Sheriffs, and their Officers, for Escapes, Rescues, &c.

Three escaped,
and one
Action
for all,

SIX Men were bound in a Recognizance jointly and severally, and three were arrested, and in Execution, and suffered to escape; and the Plaintiff brought one Action of Debt upon the Statute for the Escape of them all, and adjudged good. *Kelw.* 67, 68.

Escape
upon Out-
lawry,
Action
tam pro
Rege, quam
pro seipso.

If after a Judgment in Debt, and an Outlawry thereupon, the Defendant is taken upon a *Capias Utlagatum*, and by the Sheriff suffered to escape; the Plaintiff not being satisfied, an Action *Tam pro Rege quam pro seipso*, lies against the Sheriff for this Escape, as well in Contempt of the King,

King, as to the Prejudice of the Plaintiff. *Cro. Eliz.*

877. 1 *Roll.* 78. *Cro. Jac.* 360.

So if the Sheriff is often in the Defendant's Sheriff of Company, yet returns *Non est inventus*, &c. *Noy* ten in De-
22. *Cro. Jac.* 532. adjudged and affirmed upon defendant's
Writ of Error. Company.

So Debt lies, without saying *Tam pro Domino* Not say,
Rege, &c. *Cro. Jac.* 619, 620. for he may bring *Tam pro*
his Action for what he has lost, and the Precedents *Rege*, &c.
have been certified both Ways.

If a Supplicavit Issues out of Chancery to the Bailiff's
Sheriff against J. S. and upon this the Sheriff Affidavit
makes a Warrant to a Bailiff to take him, &c. in Court,
And after the Bailiff comes into Chancery, and there that one
makes an Affidavit that he had took him, and that rescued
he had rescued himself; upon which J. S. is com-per quod,
mitted to the Fleet by the Lord Chancellor. Tho' &c.

the Affidavit be false by which he is committed to
the Fleet, and so to his great Damage; yet because
the Affidavit was made in a legal Course, tho' he
was not compelled by Process to make it, no Acti-
on upon the Case lies, for then every Man would
be deterred from making Affidavits in such Kind:
Mich. 18 *Jac. B. R. int' Air and Kedgwit*, ad-
judged in Arrest of Judgment. *Vide* 12 *Co.* 128.
and 3 *Mod.* 108. *Palm.* 142, &c. 2 *Roll. Rep.* 195,
197, &c. *Cro. Jac.* 601, &c.

If a Bailiff Errant, or Special, arrests a Man up-Where
on a *Capias ad Satisfaciend'*, and after the Prisoner Bailiff
rescues himself, he at whose Suit he was arrest-Errant or
ed cannot have an Action upon the Case for the Special
Escape against the Bailiff, but must have it against suffers an
the Sheriff, for the Bailiff is but a Servant to the Escape.
Sheriff. Agreed int' *Atterton* and *Harward*, *Mich.*
37 *Eliz. B. R. Cro. Eliz.* 349.

Not carrying the Party to put in Bail.

Action against him that escapes.

So an Action lies not against the Bailiff for refusing Bail, but for not carrying the Party before the Sheriff in order to put in Bail. 2 *Mod.* 32.

In the same Case of *Atterton* and *Harward*, where the Prisoner escapes by Rescue of himself, it is said the Sheriff may have an Action against him that escaped, for he is thereby chargeable over for this to *J. D.* and this Escape made to his Bailiff, was an Escape to himself. *Cro. Eliz.* 349.

Aliter by a Bailiff of a Liberty.

But that if such a Prisoner taken by a Bailiff of a Franchise escapes from the Bailiff, the Sheriff shall not have any Action upon the Case against him, because he is not chargeable over, but the Bailiff only is chargeable. *Vide Cro. Eliz.* 26.

Sheriff may have an Action against the Bailiff Errant.

But in the other Case, the Sheriff, if he will, may have an Action against the Bailiff Errant for the Escape; because, when he takes upon him to be his Bailiff, there is a Promise in Law to keep the Prisoner safely, and not to suffer him to escape. *Cro. Eliz.* 349.

If *J. D.* the Plaintiff recovers against the Sheriff, and the Sheriff against the Bailiff, the Bailiff may have an Action against

Also, that if in such Case *J. D.* recovers for this Escape against the Sheriff, who after in such Action recovers against the Bailiff upon an *Assumpsit* to save him harmless from Escapes, the Bailiff may after have an Action on the Case against *J. S.* that escaped, because he is chargeable over; but 'tis with a *Dubitat*, for in the same Case, *Cro. El.* 349. 'tis there said, that by the better Opinion of the Court, the Bailiff (who in this Case was Special, and liable only on his Special *Assumpsit*) should not have an Action, for his voluntary Act shall not intitle him to an Action against a Stranger.

J. S. that escaped.

Sed Dubitatur.

Simile.

Again, that if the Sheriff recovers against the Bailiff for the Escape, (as it seemed he might upon his *Assumpsit* in Law) the Bailiff may well after

ter have an Action against J. S. who escaped, because he is charged over for it; but this also with a *Dubitatur ut supra*.

If the Bailiff of a Franchise makes a false Return to the Sheriff, and the Sheriff returns it to the Court accordingly, an Action lies against the Bailiff, and not against the Sheriff, for no Default is in him. *Trin. 39 Eliz. B. R. int' Palmer and Marsh, Vide 1 Roll. 99. Pl. 1. Moor. 432. Cro. Eliz. 512.* Where Bailiff of a Franchise makes a false Return to the Sheriff

riff, and Sheriff returns it to the Court.

The Lord of the Franchise must answer for it, if his Bailiff is unable. *2 Brownl. 50. per tot' Cur'*, and such Bailiff shall answer for his Deputy. *Litt. Rep. 33. Vide postea.*

If A. recovers in Debt against B. and thereupon a *Ca' sa'* is directed to C. the Sheriff of N. to take B. in Execution, which is accordingly done, and after B. rescues himself, *per quod* C. becomes liable to answer for the Debt. Now C. may have an Action against B. before A. sues C. for the Rescue and Escape was a Wrong to C. and he is always chargeable to A. for it; and if C. must stay till sued by A. B. may die in the interim, or fly his Country, &c. Adjudged, *Hill. 29 Eliz. int' the Sheriffs of Norwich and Bradshaw. Vide Cro. Eliz. 53. and 123.* Where the Sheriff may have an Action against Rescuer before he is sued.

If a Man be arrested upon Mean Process at the Suit of J. S. and he escapes, J. S. may have a Special Action upon the Case against the Sheriff for this Escape, *Roll. Rep. 14. Jac. int' Proby and Lumley, adjudged per Admittance, 16 Ed. 4. 3. by all the Justices. Vide Cro. Jac. 807. Moor 852. Pl. 1162.* For Rescuer upon Mean Process.

If at the Petition of A. and the rest of the Creditors of B. a Commission upon the Statute against Bankrupts is issued out against B. and there- One refusing to be examined concerning a

Bankrupt's Estate, escapes upon

upon the Commissioners sit, and offer Interrogatories to C. and he refuses to be examined, and by them is thereupon committed to Prison, and the Gaoler suffers him to escape; A. may have an Action again the Gaoler for this Escape. Adjudged *Trin. 12 Jac. int' Barns and Cary. Vide 1 Roll. Rep. 47. 2 Bul. 236. Moor 834. Pl. 1123.*

Bailiff
takes the
Party,
and She-
riff re-
turns *Non*
est inven-
tus.

The Plaintiff declares, that upon a *Capias* against J. S. at the Suit of the Plaintiff, to the Defendant, being Sheriff of E. directed, the Defendant did direct his Warrant to the Bailiff of such a Liberty to take him, &c. who did take him accordingly; yet the Defendant knowing thereof, had returned *Non est inventus*, *Cro. Eliz. 729.* adjudged *pro Quer'*, but it did not there appear what or whether the Bailiff had made any Return to the Sheriff.

Against
the Bailiff
of the Li-
berty on-
ly.

If a Writ of Execution comes to the Sheriff, and he makes out his *Mandate* to the Bailiff of a Liberty, who takes him, and after suffers him to escape, an Action lies against the Bailiff of the Franchise, and not against the Sheriff. 5 *Ed. 4. 1. Bro. Escape 40.*

Where
old Bailiff
of Fran-
chise re-
turns, Ad-
ministra-
tor has no
Goods,
præter-
quam, &c.
and She-
riff makes
a Return
accord-
ingly.

If upon a *Fieri fac'* against an Administrator, the Sheriff makes a Warrant to the Bailiff of a Franchise to execute it; and after the Bailiff is removed, and another Bailiff elected, and after the old Bailiff returns in his own Name to the Sheriff, that the Administrator has not any Goods, *præterquam, &c.* The which is false, and after the Sheriff makes a Return accordingly to the Court, yet no Action upon the Case lies against the old Bailiff, for the Return ought to have been made in the Name of the new Bailiff, and so the Sheriff had accepted of a Return as of a meer Stranger, which is void; and he ought to take Notice of the right Ministers of the Law, and therefore the old Bailiff is not punishable

answerable for this false Return, but the Sheriff: Adjudged, *Trin. 39 Eliz. int' Palmer and Marsh,* and *Halmer and Porter*, that it doth not lie against the Bailiff. *Vide 1 Roll. Abr. 94. Pl. 2. Moor 431. Pl. 606. Cro. Eliz. 512.* See after concerning a Bailiff.

In an Action upon the Case for an Escape up Sheriff on Mean Process, the Defendants Sheriffs of *London* plead, that the Prisoner was rescued from them: And the Plaintiff by Replication gives a History of the Matter, to prove that the Defendants might have brought the Prisoner to have Gaol, and Judgment was given against the Plaintiff. *1 Lut. 129.*

Plaintiff says they might have brought him to Gaol.

It is said, a Sheriff is not bound to return a Writ directed unto him, except the Party whom the Writ doth concern, doth tender him his Fees for the executing of it, that is, in such Cases where he is allowed Fees. Yet a *Quare* is made thereof, for that the very Words of the Writ do enjoin the Sheriff to make a Return of them, so that it seems he is to return them, whether the Parties concerned do call on him or not; and if he be not paid his Fees where he is allowed to take them, he may recover them by an Action. *Pra. Reg. last Pub. 586, 587.*

If a Sheriff omits the Returning of an Action against a Prisoner charged with such Action in his Custody, when such Prisoner brings his *Habeas Corpus* to turn himself over to the *Queen's Bench*: This is an Escape in the Prisoner, as to the Action omitted to be returned, and the Sheriff shall be answerable for it. *Ibid. 588.*

On the Return of a Rescue on Execution the Court fined the Sheriff 100*l.* and held it void; but a Rescue.

Sheriff fined on return of

but upon Indictment of Rescue, the Court will bring in the Rescussors, but will do nothing on the Execution; but on mean Proceſs it is good. 2 *Keb.* 571. *Pl.* 80.

Scape-
Warrant.
Executed
on the
Lord's
Day.

Note, That by a late Act of 5 *Anna Regina*, For the better preventing Escapes out of the Queen's Bench, and Fleet Prison, it is enacted, that it shall be lawful to apprehend and take upon the Lord's Day any Person or Persons, by Virtue of any Warrant or Warrants granted in pursuance of the said Act, or of all former Acts for that Purpose.

Where
the Esca-
pers retaken
are to be com-
mitted to
the Sher-
riff's Pri-
son for
Debtors.

Note, By the said Act, 5 *Anna*, Persons that are taken by Virtue of 1 *Anna*, *Sess.* 1. *Stat.* 2. *Cap.* 25. instead of being committed to the Common Gaol of the County where taken, shall be committed to the Prison where the Sheriff keeps Debtors, subject to the same Rules and Penalties, and in the same Manner in every respect as if committed to the Common Gaol; and in Case of Escape, the Sheriff shall be answerable as in Case of any other Escape. And the Judges of the Courts in the last mentioned Act may grant Warrants upon Oath in Writing, made before Commissioners (under the Seal of the same Court) to take Affidavits in the County, the Oath being first duly made.

And the
Sheriff
answer-
able for
Escapes.
Oath.

If Per-
sons com-
mitted
for not
perform-
ing De-
crees of
Chancery,
&c. e-
scape,
Sheriff
must be
answer-
able.

Also if any Person in Custody by Virtue of this or former Act, or otherwise, for not performing any Decree of Court of *Chancery* or *Exchequer*, whereby Money is decreed, shall escape, then the Persons to whom the Money decreed shall have the same Remedy against the Sheriff, as if the Person escaping had been in Custody upon Execution, and recover the same with

with Costs, in any Action to be brought in any the Courts of Record at *Westminster*.

Where the Defendant brings a Writ of Error to reverse a Judgment given against him, and hath a *Supersedeas* to stay Execution upon the Judgment, directed to the Sheriff of that County where the Execution is to be done, and yet he is taken by the Sheriff, by Virtue of an Execution taken out upon this Judgment, before the Writ of Error is brought, but not executed till after the Writ allowed, and *Supersedeas* sued out; upon moving of the Court, they will grant him a *Supersedeas* to supersede this Execution. *Pract. Reg.* 479.

Note, It is said, That a Warrant directed to a Constable to take *H.* to find Sureties for his good Behaviour, may be executed on a *Sunday*, notwithstanding *Stat. 29 Car. 2. Chap. 9.* See after, and *vide Raym. 250, 251.* And so may all Proceſs for Treason, Felony, Breach of the Peace or Escapes, &c. so on a *Capias Utlagat'*, &c.

If a *Venire facias* comes to the Sheriff in a *Qua*-Sheriff *re Impedit*, and the Sheriff sends to the Bailiff of the City of *C.* to return the Panels, who does it accordingly; whereas he had no Warrant to do it, not being Bailiff of the Franchise, for which the Panel is quashed; the Plaintiff for this Default in the Sheriff, and for his Damages, shall have an Action upon the Case against the Sheriff. Adjudged, 31 *Aſſ.* 13. *Br. Bill.* 21. *Retorn' de Br.* 77. *Action sur le Case* 120. *Vide 1 Roll. Abr.* 94. *Pl.* 2. 2 *Vent.* 26. *Fitz. Barre* 307. 1 *Mod.* 32.

If

Sheriff takes Inquisition upon an *Elegit*, and upon Request refuses to deliver Possession to the Plaintiff; and yet after, at the Day of the Return of the Writ, returns that he had delivered Possession to the Plaintiff at the Day of the Inquisition taken: An Action upon the Case lies against him for this false Return, though the Plaintiff after Inquisition might enter without any Delivery; for perhaps the Possession is kept with a strong Hand, so that he cannot enter without the Aid of the Sheriff. *Hill. 8 Car. B. R. adjudged int. Lister and Bromley. Vide Winch. Rep. 100. like Point.*

False Return of a Member of Parliament. The Plaintiff brought an Action against the Defendant for a false Return of a Member of Parliament, instead of the Plaintiff who was duly elected, and for that no Determination in Parliament was alledged by the Plaintiff, or found in the Special Verdict, Judgment was given for the Defendant. *1 Lut. 82.*

Where he must not take a Warrant to confess a Judgment. That no Bailiff or Sheriff's Officer shall presume to exact or take from any Person, being in his Custody by Arrest, any Warrant to acknowledge a Judgment, but in the Presence of an Attorney for the Defendant, which Attorney shall then subscribe his Name thereunto, upon Pain of being severely punished for so doing. *Pract. Reg. 71 & 121.*

Neither may a Solicitor, or. Also it was held, That a Warrant to confess a Judgment taken of a Man under Arrest, in the Presence of an Attorney's Clerk or Solicitor, was void. *Ib. 122.*

Attachment for not returning a *Venditioni exponas*. An Attachment was granted against the Sheriff of C. for that he returned he had taken Goods upon a *Testatum Fieri facias*, but that they remained in his Hands for Want of Buyers; whereupon a Writ issued to put them to Sale, of which he made no Return, nor any Satisfaction to the Plaintiff. *Ib. 55.*

By

Ch. 26. Of Remedies against Sheriffs, &c. 431

By Statute 29 Car. 2. cap. 9. it is enacted, That Against no Person on the Lord's Day shall serve any Process, Stat. 29 Car. 2. &c. except in Cases of Treason, Felony and Breach of the Peace; but that such Services shall be void, and the Persons serving the same shall answer Damages, as if they had done the same without Warrant. *Vide Raym.* 150, 251. But Escape Warrants, &c. may be executed on the Lord's Day. *Vide antea.*

An Attachment was granted by the Court of B. R. against a Bailiff, for executing the Process of the Court against the Rule of the Court, he having Notice of the Rule. *Pract. Reg.* 56. For executing Process against Rule.

So an Attachment was granted against a Bailiff of a Liberty, who on a *Latitat* had arrested the Defendant and taken Sureties, and returned a *Capi Corpus*, but never brought in the Body; but combining with the Defendant, let him go at Liberty. *Raym.* 193. Against Bailiff of a Liberty.

So an Attachment was granted against a Bailiff for driving a Distress into a Franchise, and would not suffer Replevin of them. *1 Keb.* 804. *pl.* 72. For driving a Distress.

An Attachment it is said cannot be granted against the Marshal of the King's Bench; for this would be to let all the Prisoners escape; but a Fine may be set upon him by the Court for Misdemeanours in his Office. *Pract. Reg.* 57. Not against Marshal of B. R. but Fine may be set.

Amerciaments. *Vide antea, cap. 7. cap. 25.*

The Sheriff is to be amerced for the Faults of his own Bailiffs, for the Sheriff is the Officer of the Court, and not they. *Pract. Reg.* 58. For the Bailiff's Faults.

The Sheriff of York was amerced in B. R. for not returning a Writ of *Habeas Corpus cum causa*, tho' he was commanded not to do it by the Bishop then President there. *Ibid.* For not returning Hab' Corp.

Not a
Sheriff,
&c. out of
Office.

A Sheriff, nor any other Officer out of his Office, cannot be amerced by the Court, for then he is not an Officer to the Court, but a *Distringas* must issue out against him. *Ibid.*

For re-
turning a
Bill of
Middlesex
with a *Superfedeas*.

The Bailiff of *Westminster* had returned a Bill of *Middlesex* with a *Superfedeas* out of *Chancery* because it was with an *Ac etiam*; the Court conceived the Return void, and gave him only four Days to return his Writ, in Pain of 100 l. and would not suffer him to take him by a new Writ. *Ibid.* 59 & 60.

Party ar-
rested be-
fore Writ
deliver'd.

If a Sheriff make a Warrant to arrest a Man, and the Bailiff arrest him accordingly, and that before any Writ delivered to the Sheriff; it is said to be, without all Controversy, a Trespass, though a Writ be delivered afterwards. 1 *Saund.* 298, 299. and vide 2 *Keb.* 173, 838. But see before *econtra*, if the Writ be sued out.

Writ an-
tedated.

Also that an Arrest before a Writ actually sued out, is not justifiable by Antedate. 2 *Keb.* 213. pl. 21.

An Arrest in the Temple is good. 3 *Salk.* 45, 285.

So is an Arrest in *Westminster-Hall*, &c. *Ib.* 46. 6 *Mod.* 90.

An Arrest in the Night, is good. *Ibid.*

What is a good Arrest; see 6 *Mod.* 90, 96, 173, 211.

Day of
Signing
to be set
down, &c.

Note, That by a Statute of 9 & 10 *W.* 3. cap. 25. it is enacted, That every Officer, or Clerk in the Courts of *Westminster*, shall set down the Day and Year of his Signing any Writ of Arrest upon such Writ, and duly enter the same on the Penalty of 10 l.

If one be arrested by the Sheriff of the County within a Liberty without a *Non omittas*, yet the Arrest is good; for the Sheriff is Sheriff of the whole County, but the Bailiff of the Liberty may have his Action against the Sheriff for entering of his Liberty: but upon a *quo minus* out of the Exchequer, a Sheriff may enter any Liberty, and execute it *impune*. *Pract. Reg.* 72. See how one may be arrested in a County Palatine upon a Special *Latitat.* 1 *Inst. Cler.* p. 34.

arrests in a Liberty upon a *non omittas*.

Simile upon a *quo minus*.

One that is not privileged from Arrest, by Reason of his Attendance upon his Business in some Court of Justice, or some otherways privileged by some Special Rule or Order of Court, may be arrested in *Westminster-Hall.* *Pract. Reg.* 73. And by *Holt*, Chief Justice, (in *Faresly* 52.) If we see one against whom there is a Judgment of this Court, walk in *Westminster-Hall*, we may send our Officer to take him up, if the Plaintiff desire it, without any Writ of Execution. Also it is said, That if a Man be arrested in the Face of the Court, the Court may discharge him, but not otherwise. *Raymond* 101. 3 *Salk.* 45, 46.

When and how one may be arrested in *Westminster-Hall*, &c.

In an Action upon the Case for an Escape, the Defendants pleaded the Privilege of going and re- turning from an inferiour Court against a Process in *Banco*, and seemed to the Court an ill Plea. *Raym.* 100.

Privilege of going, &c. not allowed.

If *A.* brings *B.* to a common Inn, of which *C.* is Host; and affirms to *C.* that he hath arrested *B.* by Virtue of a Commission of Rebellion; and in Consideration that *C.* will keep *B.* as a Prisoner by the Space of one Night, assumes and promises to save *C.* harmless, &c. If *B.* recovers against *C.* in an Action of false Imprisonment, *C.* may have an Action against *A.* upon this Promise; for tho' the Consideration, viz. the Keeping of *B.* was unlawful, yet because it did not appear to *C.* to be

A. at an Inn debars his Host to keep the Prisoner one Night &c. and promises to save him harmless, so, &c.

so, the Promise to save him harmless was good
Mich. 20 Jac. int. Fletcher and Harcourt. Hut. 55.
Wnch. 48.

Upon a *Fi fa* *A.* If *A.* recovers against *B.* Damages and Costs in *C.*
 against *B.* or *B. R.* and sues out a *Fieri facias* to the Sheriff,
 Goods are taken and who by Force thereof takes Goods of *B.* to the
 remain his Hands *pro defectu emptorum*; and after *A.* well
 unfold: knowing thereof, yet to the Intent to vex and dou-
 Yet *A.* ble charge *B.* sues out another *Fieri facias*, and
 sues out another, delivers it to the same Sheriff to be executed; who
 and other thereupon levies the Money of other Goods of *B.*
 Goods and pays it over to *A.* In this Case, for this Wrong
 are taken and Vexation, though it was in a legal Way, an
 and Mo- Action upon the Case lies. *Hob. Rep. 257, &*
 ney paid to *A.* 350. *Cro. Eliz. 574. Cro. Jac. 667.*

Sheriff returns no more Counties, &c. If a Sheriff returns upon an Exigent three or
 four *Exactus*, and that there were no more Coun-
 ties, where in Truth there were five Counties,
 the Plaintiff may have an Action upon the Case
 against him. 9 *H. 6. 60.*

Sheriff untruly returns the Tenant summoned. If the Sheriff returns the Tenant summoned in
 a real Action where he was not, by which he loses
 by Default; an Action lies against him for this.
 26 *Aff. 48.* for the Judgment shall stand, and the
 Party is put to have his Remedy against the She-
 riff. *Moor 349. pl. 467. Goulfsborough 128. Fitz.*
Bill 13.

Action against him tho' Veyors be dead. So an Action lies against the Sheriff, though the
 Summoners and Veyors are dead, for he is in this
 Action to recover all in Damages, and not the
 Land. 1 *H. 6. 1.* but *quare, & vide Fitz. Action*
sur le Case. 1 Br. 73. 1 Roll. Abr. 105. pl. 11.

Not executing an Attach-ment. If a Minister of Justice hath a Warrant to at-
 tach the Goods of another, and he can do it, and
 does it not, an Action lies against him. *Trin. 14*
Jac. 3 Bulst. 212. Vide Moor 432.

So if I shew J. S. to the Sheriff, and give him ^{Party} a Writ to arrest him, and he does not. *Cro. E.* ^{shewn to Sheriff.} *liz.* 873.

But if upon a *Capias Utlagatum* before Judg- Neglect-
ment, the Sheriff neglects to extend or seize ^{ing to}
Goods, &c. this is the King's Loss, and the Party ^{extend}
shall have no Action, though it was objected, the ^{Goods up-}
Sheriff extending, &c. would have been a Means ^{on a Cap.} *Utlagat*
to force the Defendant to appear; but it was said,
That if it had been shewn that the Sheriff might
have taken his Body, &c. there would have
been more Reason to support the Action, &c.
2 Vent. 90.

If a Distress at the Suit of A. issues out of the J. S. no
Court of C. directed to J. S. (who is not the usual ^{usual Of-}
Officer) to distrain the Cattle of B. &c. Or that ^{ficer exe-}
B. should find Pledges to appear the next Court; ^{cutes a}
and thereupon J. S. distrains the Cattle of B. and ^{Distress,}
after re-delivers them to B. without taking suffi- ^{and deli-}
ent Security, &c. and B. does not appear; an Acti- ^{vers the} Cattle.
on lies against J. S. for this Deceit, notwithstand-
ing he is no known Officer, but *hac vice* only; ad-
judged *inter Wild and Douz.* *Latch.* 159. upon a
Writ of Error.

If upon a Writ *de Coronatore eligend* the Sheriff Writ *de*
will not return him Coroner that is chosen by the ^{Cronatore}
major Part, an Action lies. *2 Vent.* 26. ^{eligen}.

It is said, that no Under-Sheriff ought to be an ^{No She-}
Attorney, for it is often the Cause of increasing ^{riff ought}
Suits, and also a Hindrance in Dispatch of Clients ^{to be an}
Causes, by Reason of his double Capacity and In- ^{Attorney.}
terest, and of his great Power he may have in the
Country, where he is such an Officer, that it is
also against the Statute. *Pract. Reg. last pub.* 12.

And by Statute 4 H. 4. 19. no Steward, Bailiff ^{Neither a}
nor Minister of Lords of Franchises, which have ^{Steward,}
Return of Writs, shall be Attorney in any Plea ^{Bailiff,}
^{&c.}
F f 2 within

within the same Franchise or Bailiffwick, whereof he is or shall be Minister or Officer.

Concerning *Amerciaments* on Sheriffs, and how to be discharged, see before, *Chap. 7* & 25.

See Actions against Sheriffs, &c. for false Returns of Writs, &c. 3 *Salk.* 57, 149, 314, 315. 1 *Sid.* 23. 1 *Vent.* 55, 85. 1 *Mod.* 239. 2 *Mod.* 83. 6 *Mod.* 290. 1 *Salk.* 12, 322. 4 *Mod.* 403. *Cumb.* 322.

References to Precedents of Actions, for and against Sheriffs and their Officers, &c.

Where
one pro-
mised to
render
himself.

§. FOR the Sheriff against one taken in Execution, who in Consideration that the Plaintiff would permit him to go at large with two Servants, promised to render himself within a Day. *Rob. Ent.* 96.

By a
Gaoler.

§. By a Gaoler against a Prisoner for breaking the Gaol. 2 *Mod. Intr.* 95.

Sheriff
against
Gaoler.

§. For a Sheriff against the Gaol-Keeper, thro' whose Negligence the Prisoner escaped. *Regist. Orig.* 110.

Prisoner.

§. For the Sheriff against a Prisoner escaped out of Execution. 1 *Lut.* 64.

Rescou-
for.

§. For the Sheriff against Rescousor upon a *Non omittas, Cap. satisf.* *Hern.* 68. *Rob. Ent.* 12. *Bro. Red.* 48, 49, 59. *Hansf.* 8, 32, 47. *Rob. Ent.* 21.

Disturb-
ing.

§. For disturbing the Sheriff in executing a Statute-Staple, by shutting the Doors against him and

and the Jury, so that he could not have a View of the Goods. *Co. Ent.* 112. See after.

§. For the Keeper of a Gaol against one com- Escaper.
mitted by Auditors for the Arrearages of an Ac-
count, who made an Escape, whereby the Plaintiff
satisfied the Money. *F. N. B.* 95, 130.

§. For a late Sheriff against the Bailiff of a Against a
Hundred, who by the Plaintiff's Warrant levied Bailiff.
Money payable in the *Exchequer*, and paid it not
to the Plaintiff. *Hern.* 165. *Rob. Ent.* 15.

§. For the Lord of a Barony having Execution *De Fran*^r
and Return of Writs within his Barony by Pre- *less*.
scription, against one that arrested a Man within
his Barony. 1 *Brownl.* 70. *Vidian* 55.

§. *Aliter pro Guardiano & Balivo Libertatis,*
&c. *Thompsl.* 42. *Simile pro aliis.* *Hern.* 103,
225. *Winch. Ent.* 83. *Brownl. Red.* 47, 49.

§. By the Mayor of York against a Sheriff's Bai- *Simile per*
liff for arresting one within the Limits of the Ca- *Major*.
thedral Church. *Simile pro Episcopo per Præscript.*
1 *Brownl.* 254. *Hern.* 224. *Ast.* 34.

§. By the Marshal against the Warden of the Against
Fleet for an Escape of one committed in Execution. *Warden*
of *Fleet*.
2 *Brownl.* 13.

§. Against a Steward of a Hundred who cau- Steward.
sed the Plaintiff's Cattle to be taken out of his
Custody in Replevin, without Pledges found to
prosecute and return them. 2 *Brownl.* 208. *Brownl.*
Red. 25.

§. Against the Bailiff of an inferior Court, who Bailiff of
withdrew himself when an Inquisition ought to inferior
have been taken, after an Attachment of Goods Court.
for Debt, whereby the Plea was discontinued, and
the Goods delivered, the Debt being unsatisfied.
Reg. Orig. 99. *Brownl. Red.* 73.

Of Court of a Liberty. *§.* Against the Bailiff of the Court of a Liberty, who upon Summons returned that the Plaintiff *nihil habuit*, and caused him to be taken and imprisoned upon a *Capias* until he made Fine. *Rob. Ent.* 11.

Of Marshal's Court. *§.* Against a Bailiff of the Marshal's Court who permitted one arrested at the Plaintiff's Suit to go at large. *Reg. Orig.* 111.

Of a Liberty in *Middlesex*. Against a Bailiff of a Liberty in *Middlesex*, for an Escape of one arrested upon a *Capias* in *Trespas* after a *Pone* in *B. R. Upp. Bench. Pres.* 49. The like upon a Bill of *Middlesex*. *Id.* 236.

Of a Hundred. *§.* Against a Bailiff of a Hundred who neglected to arrest one present, by a Warrant upon an *al. Cap. in trans.* 3 *Brownl.* 40.

Mayor and Bailiff. *§.* Against a Mayor and Bailiffs concerning an Escape of one arrested by Plaintiff in Case. *Hern.* 89.

Mayor and Commonalty. *§.* Against a Mayor and Commonalty, &c. for a false Return of a *Mandamus*. *Vidian.* 1. *Simile versus Magd. & Socios Collegii*, for Expulsion and a false Return. *Ib.* 3.

Sheriff of London. *§.* Against the Sheriff of London for an Escape upon a Plaintiff. *Hern.* 129.

Simile for a Contempt. *§.* Against the Sheriff of a City for a Contempt, in not proceeding in a Plaintiff in the Court of the City, according to the three Writs of *Procedendo* to him delivered. *Rast. Ent.* 83.

Against Keeper of Ludgate. *§.* Against the Keeper of the Prison of Ludgate, for the Escape of a Bankrupt indebted to the Plaintiff, and committed by Commissioners. *Hern.* 184. *Rob. Ent.* 82.

Constable of a Castle. *§.* Debt against the Constable of the Castle of Chester, for the Escape of a Prisoner taken by a *Testat. Ca. sa.* awarded to the Chamberlain of Chester. 1 *Lutw.* 411.

§. For that the Defendant arrested R. at the Plaintiff's Suit in Debt; and in Consideration of 20*l.* paid him by the Plaintiff, promised to have the Party arrested before the Justices the next Term, or to pay the Debt. *Rob. Ent.* 104.

§. For that the Plaintiff delivered to the Under-Sheriff a *Cap. Utlagat.* and the Defendant in Consideration of 40*s.* promised to arrest the Party before the Day, and to have him before the Justices at the Day in the Writ, or to pay 40*s.* and the Defendant arrested the Party, but had him not before the Justices. *Brown. Red.* 43.

§. For a false return of a Member of Parliament. 1 *Lut.* 82. False Return.

§. Action on the Case for Return of a *Mandamus.* 2 *Lut.* 1012. *Vide* 11 *Co.* 94. *Mandamus.*

§. Action against the Sheriff for an Escape upon a *Capias* with Security for Appearance. *Hern.* 129. For an Escape.

§. For an Attorney against a Sheriff, upon an Escape of one arrested by an Attachment of Privilege in Debt. *Hern.* 128. *Simile Up. B. Pres.* 50.

§. Against the Sheriff of *Middlesex* for an Escape of one arrested by Bill of *Middlesex*, with Intention to declare in Debt for an Executor upon a Bond, *Up. B. Pres.* 47. *Simile by Executor.*

§. For an Escape upon a *Cap. Utlagat.* before Judgment. *Rast. Ent.* 8. 1 *Brownl.* 227. 3. *Brownl.* 39, 94. *Ast.* 32. *Hern.* 74. 1 *Lut.* 108, &c. *Simile sur Cap. Utl.*

§. *Simile & Languidus* Return. *Hern.* 167. *Languidus.*

§. For an Escape upon a *Capias Utlagat.* after Judgment, and the Writ not returned. 3 *Brownl.* 89. 1 *Brownl.* 18. *Brown. Red.* 33. *Rob. Ent.* 100. *Simile after Judgment.*

§. *Simile* for one taken upon a *Cap. Excom.* against whom was Sentence for Money not paid concerning Tithes. 1 *Lut.* 122. *Sur. Cap. Excom.*

§. For an Escape upon a Statute Merchant, *Sur Stat. Reg. Orig.* 98.

*Sur Cap.
Utlagat.*

§. Against a Sheriff who neglected to execute a *Cap. Utlagat'* upon one being present, and returning *non est inventus*. *Ast.* 57. 3 *Brownl.* 35. *Tho.* 38.

§. *Simile* upon a *Capias Utlagat.* Special after Judgment. *Up. B. Pres.* 123.

Sur Ca. Sa.

§. *Simile de Testat.* *Ca. Sa.* *Ast.* 30. *Simile de Statute-Staple.* *Hern.* 167.

Escape.

§. For on Escape upon a *Cap. ad computandum*, *Ast.* 13.

§. *Simile* upon an Attachment of Privilege. *Cl. Assist.* 261.

Judic.

§. *Simile sur Judic. in trans.* *Reg. Orig.* 98.

§. *Simile* upon a Process out of a Mayor's Court, 1 *Bro.* 49.

§. *Simile* upon a Plaint levied in the Counter, *Rob. Ent.* 398, 308.

*Not re-
turning
Fi. fa.*

§. Against a Sheriff who executed a *Fieri Facias*, and paid not the Money to the Plaintiff, nor returned the Writ. 3 *Brownl.* 86.

*Nor Ven-
ditioni ex-
ponas.*

§. Against a Sheriff who upon a *Fieri fac.* returned, that he had taken Goods *ad valentiam*, which remained unsold, and did not return a *Venditioni exponas* delivered to him, but converted the Money to his own Use. 1 *Brownl.* 233. *Bro. Red.* 36.

*Nibil ha-
bet.*

§. Against a Sheriff who returned that the Plaintiff had nothing, whereas he had Lands, *Reg. Orig.* 98.

*Langui-
dus.*

§. For returning *Languidus in prisona.* *Rob. Ent.* 9.

*False Ret.
sur Sci. fa.*

The like for a false Return upon a *Scire fac. quod Scire fecit, ubi non Scire fec.* *Reg. Judic.* 9, 10.

*Simile qd'
nulla bona*

§. Against a Sheriff who upon a *Scire facias* of a Testator's Goods, returned *nulla bona*, &c. whereas the Executor afterwards wasted the Goods and died. *Hern.* 170.

§. *Nulla*

§. *Nulla bona* by Bailiff of a Liberty who executed the *Fi. fa. Vidian.* 6. *Simile.*

§. Against a Sheriff who impanelled the Plaintiff Impa- in divers Juries, whereas he had not Land to the nelling Yearly Value of 4*l.* *Hern.* 84. Plaintiff.

§. Against a Sheriff who executed a Writ of Executi- *Seisin* and *Elegit* in Waste, after a *Superfedeas* up- on after on a Writ of Error delivered to him and allowed. *Superfede- as.* *Hern.* 213. *Rob. Ent.* 47.

§. Concerning a Writ of Exigent after Judg- Not Ret. ment not returned. *Ast.* 33. *Ex. fa.*

§. For taking above 12*d.* in the Pound for ex- Extorti- ecuting a *Ca. fa.* *Hern.* 190. on.

§. Against a Sheriff for suffering an escaped Pri- For a 2d soner (taken up by a Judge's Warrant and Com- Escape. mitted to him) to make a further Escape. 1 *Inst.* *Clerical. last pub.* 377, &c.

§. Against a Sheriff's Bailiff, who having taken Not car- g. in Execution at the Plaintiff's Suit, in Consi- rying Pri- deration of Money paid and to be paid, promi- soner to sed safely to keep him, and to deliver him to the Gaol. Gaol. if he would not satisfy the Plaintiff. *Ast.* 28.

§. Against a Bailiff who arrested the Plaintiff's *Simile sur* Debtor upon a *Cap. Utlagat.* and in Considera- *Cap. Utl.* tion of 8*s.* paid, and Charges to be paid, promi- sed to bring the Prisoner to the Gaol, which he did not do, but suffered him to escape. 3 *Brownl.* 85.

§. Against Bailiff of a Liberty for not return- Not re- ing his Writs. 1 *Bro.* 42. *Rob. Ent.* 87. *Vidian* 6. turning *Vide Clerks Ast.* 217, 262. See after. Writs.

§. *Simile* for an Escape, reciting the whole Judg- Escapes. ment thereon. *Rob. Ent.* 311. *aliter Read's Dec.* 89. *Cl. Assist.* 280. *Vid.* 40. *Rob. Ent.* 229, 309.

§. *Aliter* for an Escape, and returning *Non est* Escape. *inventus.* *Br. Red.* 52.

§. *Vers.*

Under-
took Ap-
pearance.

§. *Verf. Ballivum Libertat.* who arrested the Party; and for a Consideration promised he should appear at the Day, or that he would pay the Debt. *Rob. Ent.* 104.

Bailiff's
Servant.

§. Against the Servant of a Bailiff of a Liberty, who promised to arrest a Man upon a *Latitat.* *Ibid.* 102.

Serjeant.

§. Against a Serjeant of the Counter for an Escape. *Bro. Met.* 21.

Warden.

§. Against the Warden of the *Fleet* upon an Escape. *Re. Dec.* 93.

Marshal
B. R.

§. Against the Marshal of the *King's Bench*, where a Prisoner by *Hab. Corp.* was committed to the *Fleet*, and afterwards by another Writ committed to the Marshal, &c. *Rob. Ent.* 306.

Simile.

§. Against the Under-Marshal, who permitted one arrested at the Plaintiff's Suit to go at large. *Rob. Ent.* 300.

Escape.

§. Against the Sheriff for Escapes, *Sur Cap. Utlagat.* 1 *Bro.* 18. *Bro. Red.* 33.

§. For an Escape upon *Mesne Process.* 3 *Lev. Rep.* 42, 43.

§. Upon an Escape of one arrested upon a Bill *Midd. Tho.* 31. *Hansf.* 48.

Not ac-
cepting
Appear-
ance.

§. For not accepting a Common Appearance where the Debt was under 10 *l.* 2 *Mod. Intr.* 106.

Simile of
good Bail.

§. Against Sheriff's Bailiff for not accepting good Bail offered him upon an Arrest. *Bro. Red.* 63.

§. For holding to special Bail, &c. (*malitiose*) where none was required. 2 *Salk.* 727.

For re-
turning
Rescous.
Rescou-
sors.
Plead-
ings.

§. For his returning to the Sheriff a Rescue by the Party, whereas he made none. *Cl. Mar.* 182.

§. Concerning Rescousors. *Rob. Ent.* 12. 21. *Bro. Red.* 48, 49. *Mod. Intr.* 23. *Hansf.* 8. 32, 47.

§. The Defendant on Escape pleads he did not permit the Party to go at large. 5 *Co.* 89.

§. That

§. That he did not take the Defendant on a *Aliter*.
Bill of *Middlesex*. *Ast.* 14.

For the Pleadings and Justifications to Actions in
Trespas, see a Treatise, intituled, *The Law of*
Trespas.

§. Against the Sheriff for an Escape upon a *La*-Escape.
titat. Rob. Entr. 303.

§. The like against the late Sheriff. *Ibid.*

§. The like upon a *Ca. sa.* after a Recovery in
Assault. *Ibid.* 305.

§. For an Escape upon an Arrest in the Time of
the late Sheriff, who delivered the Prisoner over.
Vidian 15.

§. For not returning of Writs. *Cl. Ass.* 217, Return.
262.

§. For insufficient Security upon Arrest by Bill Insuffici-
of *Middlesex*. 2 *Saund.* 51. *Simile & Cepi Corp.* ent Secu-
Retorn per Vic. 150. rity.

§. For false Returns. *Thomp.* 88. *Rob. Ent.* 9, False Re-
24, 59, 61. 2 *Ventr.* 84. *Bro. Red.* 37, 38. *Simile turns.*
2 *Inst. Cler.* 186. *Sur retorn' devastavit.*

§. Against a Bishop for a false Return upon a False Re-
Fieri facias. 1 *Sid.* 269. turn.

C H A P. XXVII.

Of the Sheriff's Demeanour in Assignment of Dower, and the Return. The Proclamations. The Sheriff's Office about Partition. His Demeanour in the Writ De Ventre inspiciendo. About returning a Force. About a Vi Laica removenda. How the Sheriff shall demean himself in a Writ of Enquiry of Waste, and of the Returns thereof. Of the Writ of Estrepment, and the Return. The Sheriff's Office in a Writ of De Excommunicato capiendo.

Of the Sheriff's Demeanour in Assignment of Dower, and the Return.

Dower.

THE Sheriff may not assign Dower against Common Right.

A Woman shall be endowed of the capital Mesuage of *Caput Baronie*, except it be of a Feudal Barony; but there are now no Feudal Baronies, (except *Arundell*). 1 *Salk.* 253.

A. Tenant for Life, Remainder for Years, Remainder to *A.* in Tail, *A.*'s Wife shall be endowed; *contra*, if the Mesne Remainder had been for Life. *Salk.* 254.

Manor.

If the Sheriff assign one Manor upon Dower recovered of three Manors, it is not good; it ought to be a third Part of each: But he may assign all the Meadow, Pasture, &c. *Mo.* 12. n. 47. — 19. n. 66. 12 *Ed.* 4. 2. *contra*.

In Common,
without
Metes,
&c.

And if a Woman be dowable of a Manor, the Sheriff may assign the third Part of the Manor in Common instead of Dower, without setting out by Metes and Bounds, so assigned in *Chancery*. *Anc. Ent. Qu. Imp.* 529. 10.

If

If a Woman be endowed of an Advowson, she shall be assigned the third Part of the Advowson, and not only the third Part of the Profits, (*viz.*) the third Presentation. 17 Ed. 3. 8. b.

If a Woman recover Dower of a Rectory Impropriate where there is not any Glebe, the Sheriff shall put her in Possession of the third Part of the Tithes generally, and not of the Tithes of the Land, which issue out of any third Part of the Land of the Parish in certain. Mich. 9 Jac. B. *per Cur.*

The Writ of Dower was *de tertia Parte Rectoris Tithes* *ria de D.* and upon that the *Grand Cape* issued, ought not *Cape in manus nostras tertiam partem Rectoriae*, &c. to be taken. and the Sheriff by Colour of this Writ took the Tithes severed from the Nine Parts, &c. it is an ill Seizure. 1 Leon. p. 92. Michel and Hide.

The Sheriff may assign a Rent in lieu of Dower. Rent in 20 Aff. 41. 7 H. 7. 34. So a Rent out of the same lieu of Land. Dower.

If the Sheriff assign Dower by Writ to him directed, and doth not return the Writ, yet she is lawfully seized of Dower. *Aliter* in a Partition by Writ; for there a second Judgment ought to be given. Cro. El. Ashborough's Case.

The Return of the Sheriff in Assignment of Dower, need not have such precise Certainty, as of the Declarations and Indictments; therefore the Return was, *Quod habere fecit seisinam de 13 Messuagiis, five Tenementis, cum Terris & Pratis eisdem pertinentibus tunc vel nuper in tenura*, &c. it is good enough; and when he saith in the End, he delivered them all by Metes and Bounds, it is sufficient. Cro. Jac. 621. Sir Ch. Howard's Case.

It was moved for Amendment of Assignment of Dower, being under Value, and on Refusalment of an equal Division proffered to him by the Dowager, Assignment of Dower.

Dowager, with Liberty to chuse which two Part he would for the Heir: Which the Court ordered and committed the Sheriff for taking of 60 l. of the Lady Longvill, to execute his Writ of *Execution*; and *Information* was brought against him: *1 Keb. 743. Longvill's Case.*

Plea in
Dower.

Detinue of Charters is no Plea in Dower after Imparlance. *Salk. 252.*

As to Proclamations in Dower.

Where the Sheriff returned, he had proclaimed the Contents of the Writ; this was held insufficient, for he must return, that he made Summons of the Land.

The Sheriff upon the Statute of 31 Eliz. i. he make Proclamation at the most usual Door of the Church, though Part of the Land lie in another Town in the same County, it is sufficient, though the Words of the Statute are, *Parishes or Chapels*. And tho' there be no actual Summons, but only the Names of the Summoners, it is good; for that is all the Form at Common Law, and the Statute alters not that. *Hob. 133. Allen and Walker.*

The Forms of Returns; as Proclamation at the Church-Door, the Return of a Writ of *View*, the Return of a Writ of *Seisin in Dower*, the Return of a Writ of *Enquiry of Damages in Dower*. *Vid. Dalton, c. 56. fo. 224, & New Ret. Brev. from 195 to 204.*

Tho' he
need not
make
Procla-

In Dower of Freehold in *M. magnâ* and *M. parvâ*, the Sheriff returned *Pleg' de proseguendo* *J. D. J. R.* and the Names of the Summoners: *J. D.*

mation, yet returning he did, he ought to shew of what;

J. D.

Ch. 27. Of Assignment of Dower.

J. D. and R. F. and after the Summons made, and by the Space of 14 Days and more, before the Return of the said Writ, at the most usual Church-Door of *M. magna*, where Part of the Tenements lay, on the 27th of *Octob.* being the Lord's Day, immediately after Sermon in that Church, he publicly proclaimed all and singular Things contained in the Writ, to be proclaimed according to the Form of the Statute in that Behalf made and provided. *L. P. Armig' Vic.*

Per Cur', It is sufficient to make Proclamation at any of the Churches where the Land lies, and he need not do it at all: But because he said, he had caused to be proclaimed all and singular in that Writ contained, and saith not what, the Return was adjudged insufficient. *1 Brownl. 126. Allen and Walter.*

Tenant in Dower dies before the Writ of Inquiry executed, the Administrator cannot bring a *Scire facias* for the Damages and mesne Profits. *Salk.*

252.

Upon a Return of a Writ of *Enquiry in Dower*, Errors were assigned:

1. The Original Writ appears not to be returned according to the Statute; for the Year doth not appear when it was returned.
2. The Proclamation made by the Sheriff, appears not to be where the Land lies.
3. The Return does not mention that the Proclamation was after the Summons, as it ought. *Hob. Allen's Case.*
4. It is not said, he did make Proclamation on the Land; but the Words *secundum formam Statuti* extend far.

Quare, for the *Certiorari* was not well returned in *B. R. Stile's Rep. p. 67. Thyn and Thyn.*

Note,

Where
Errors
only may
be assign-
ed.

Note, No Error can be assigned on the Sheriff's Act in giving the Seisin, and returning thereof, except it is where Damages are to be enquired; for if any of them be ill, then the Recovery of the Damages being entire, it is ill for all. *Cro. Jac. 621. Sir Ch. Howard's Case.*

Summons If Summons be made in some Part of the Land within the *Vill*, it is good; neither is it necessary to make the Proclamation where the Summons is. *Stile's Rep. 91. Thyn.*

Precedents.

Summons. Summons, Return of the Writ of *Seisin*, and Execution upon it in Dower. 2 *Sand. 45, 92. Hesketh and Lee.*

Refusal On *Habere fac' seisinam*, in a Writ of Dower of to accept the third Part, the Sheriff returned, that he offered to the Demandants the Seisin of the third Part of the Tenements aforesaid by Metes and Bounds in certain, according to the Tenour of the Writ, and they refused to accept them of him. *Per Cur'*, the Entry of the Demandants is now lawful; and the Court refused to award *Habere fac' seisinam de novo*, as a Thing never known. *Dyer 278.*

Where the Sheriff cannot make a Deputy. *A.* brought Dower against the Son, to be endowed of Lands, of which her Husband (the Father of the Defendant) died seised. A Writ issued forth to enquire of the Damages, and he made his Warrant to *J. S.* to take the Inquest. It was the Opinion of the Justices, that he cannot in this Case make a Deputy, because it was a Judicial Act, and he must do it in Person. *Noy 21. Randal's Case.*

Sheriffs

Sheriff's Demeanour in the Writ De Ventre Inspiciendo.

Writ was directed to the Sheriff, that he should Of a Wi-
cause D. &c. to be viewed by Twelve Knights, dow.
and searched by Twelve Women in the Presence View.
of the Twelve Knights; & *ad tractandum per ube-* Search.
ra, & ad ventrem inspiciend', whether she were
with Child or not, and to certify the same into
Common Bench; and if she were with Child, to Certify-
certify how long Time in their Judgments, & *quan-* cate of
do sit paritura. The Sheriff returned, that she Time.
was Twenty Weeks gone with Child, and that
within Twenty Weeks *suit paritura.*

Whereupon another Writ issued out of the Safe Cu-
Common Bench, commanding the Sheriff safely to stody.
keep her in such an House, and that the Doors
should be well guarded; and that every Day he Daily
should cause her to be viewed by some of the Wo- View.
men named in the Writ (wherein they were na-
med); and that when she should be delivered, some
of them should be with her to view her Birth, whe-
ther it be Male or Female.

Upon this the Sheriff returned, he had caused Return of
her to be kept, &c. and that such a Day she was Delivery,
delivered of a Daughter. *Cro. El. 566. Willouby's*
Case. Co. Lit. 8. b. Mo. 523. pl. 692. Cro. Eliz.
566.

But in *Theaker's Case*, the Woman to be in- Other-
spected was a *Feme Covert* (to a second Husband), wife or-
and she was with Child by the first; they took dered in
not the same Course, but left her with her Hus- *Theaker's*
band, he entering into Recognizance, that she should Case of a
not remove from the House wherein they inhabited, Wife.
and that one or two of the Women (returned by
the Sheriff) should see her every Day; and that
two or three of them should be present at her Tra-
vel

vel. Cro. Jac. 685, 686. Theaker's Case. Winch. 71. Vide Dalt. 543.

Delivery, Note, It was here returned, *quod fuit paritura* and found within 20 Weeks, and after this Course observed, Heir by she was delivered of a Female Child, who was Inquisition. afterwards by Inquisition found to be the Daughter and Heir of the said William Theaker deceased. Dalt. 544.

Partition. The Sheriff's Office about Partition, and how he is to demean himself therein.

Note, Tenants in Common were not compellable to make Partition before the Statute. 3 Salk. 208.

High-Sheriff must be upon the Land in Person. At the Time of the Partition made, the High-Sheriff must be upon the Land in Person: And if Exception be taken at the Bar before the Writ be returned and filed, a new Writ shall be awarded; but if the Sheriff in such Case returneth, that he was there in proper Person, and this Return be received, and the Writ filed, the Party cannot aver against the Return, nor shall have Error. Cro. El. 9. Clay's Case.

No Averment against the Return filed. In a Writ of Partition, if Judgment be given When Writ of *quod partitio fiat*, and upon this a Writ is directed Error lies to the Sheriff to make Partition, before that this upon Partition is executed and returned, no Writ of Error lies upon the first Judgment, because before the last Judgment (which ought to be, *Quod partitio praeferet firma & stabilis imperpetuum*) the Plaintiff may be nonsuited; or he may upon the Sheriff's Return suggest to the Court, that the Partition is not equal, and also have a new Partition. 1 Roll's Abridgm. 750. The Lord Berkley and the Countess of Warwick.

Vide 1 Institut. 171. One of the Parties sur- Inequality-
mised an Inequality in the Partition, and prayed a ty surmi-
new Writ: but afterwards resolved, that the first sed.
Partition being made by Writ, should stand good.

Et vide Godbolt 265. The Sheriff returns, that That the
he did allot Part of the Lands in Severalty; and for Jurors as
the other Part, the Jury would not assist him to to Part,
make the Partition; and an Attachment was pray- would not
ed against the Jurors, and a new Writ to the She- assist him.
riff; but the Court doubted what to do in it, and
took Time to advise. *Vide Dalt. 541.*

Where the Judgment in Partition is not removed
by a Writ of Error, *vide 3 Salk. 145.*

The Form of the Return of a Writ of Parti-
tion, *vide Dalt. c. 68. See New Ret. Brev.*
344, 345, &c.

Sheriff's Office about removing a Force.

The Party grieved may have a Writ upon the By Sheriff
Statute of *Northampton, 2 Ed. 3. cap. 3.* directed or Under-
to the Sheriff to remove the Force; and upon this Sheriff.
the Sheriff may imprison, and justifie in False
Imprisonment, as was *Levet and Farrar's Case*;
and so may the Under-Sheriff, as that Case was.

In False Imprisonment against the Sheriff, the Justifica-
Defendant justifies, for that a Writ upon the Sta- tion by
tute of *Northampton* was awarded the 30th of Ju- Stat. 2 Ed.
ly, 32 *Eliz.* to the Sheriff and Justices of the 3. ca. 3.
Peace, to remove a Force; and that he being Un-
der-Sheriff, by the Command of the Sheriff went
to the Place and found the Force; and because he
was not able to remove it, he made Proclamation, Procla-
that every one should depart, and leave their Wea- mation.
pons, &c. and afterwards he enquired of the Force;
and it being found that the Plaintiff was one of
G g 2 them,

Arrest del them, he arrested him, and imprisoned him. *Cro. Plaintiff. Eliz. 294. Levett and Farrar.*

Plea *Per Cur'*, the Plea is good: And these Points were adjudged:

Where a 1. When the Writ is directed to the Sheriff by
Thing the Name of his Office, and not by a particular
may be Name, nor doth expressly command him to do it in
done by Person, the Under-Sheriff may do it; for it is a
the Ur- Writ grounded on the Statute, and not a Commis-
der-She- sion, for then it had been otherwise.
riff.

Arrest, 2. He may arrest and imprison at another Time
&c. at upon the Enquiry, though the Force were remo-
another ved before his Coming; and he may enquire who
Time. did it.

Intend- 3. It shall be intended he continued Under-She-
ment. riff, when in the same Plea it is alledged he was
Under-Sheriff, and the contrary is not shewed.
2 Roll. Rep. 178.

Force If when the Sheriff comes to remove a Force,
that he if then one hide himself in the Corner of the
hid him- House to the Intent, &c. this is Force.
self.

The Sheriff's Office in a Vi Laica removenda.

Justifies In False Imprisonment the Defendant justifies,
in False because a Writ *De Vi Laica removenda* came to
Imprison- the Sheriff to remove the Force; and that the She-
ment. riff came to the House, and the Defendant in Assist-
ance of him, &c. and that there the Plaintiff *in*
domibus prædict' ad pacem Dom' Regis disturband',
&c. & eos residentes invenerit.

Plaintiff demurs.

Intend- 1. The Writ is, *Si aliquos in ea Parte resistentes*
ment *inveneritis*, and it is not here pleaded, that he found
him resisting *in ea parte*, i. e. to keep Possession.
But *per Cur'*, the Words in *ea parte* ought to be
necessarily intended. For when he saith, he came
to the House to remove the Force, and the Plaintiff
resisted

resisted him, then *sequitur* that he resisted him in removing the Force.

2. The Writ is *aliquos*, and the Defendant had shewed Resistance by one only. But *per Cur'*, *aliquos* includes *aliquem*.

3. He doth not aver, that it was *Vi Laica & Resist. armata potestas*. But *per Cur'*, it appears there^{ance} a was Force, and the very Resistance was a Force.^{Force.}

2 Roll. Rep. 177. Parson Closssey's Case.

Upon a *Vi Laica removenda*, if the Sheriff re-Where turn *Non inveni Vim Laicam, nec armatam potesta-* Restitu-
testatem, the Lessee shall have Restitution in *B. R.* tion upon
upon *Affidavit* that he was kept out with Force. *Affidavit.*

Upon this writ the Sheriff ought not to remove Not to
the Incumbent, who is in Possession of the Church, remove
be it by Right or Wrong; for the Sheriff is only to the In-
remove the Force, and is to suffer the Incumbent ^{cumbent.}
to enjoy his Possession. *Moor* 462. *Roberts* and
Agmondsham. *Dalt.* 220. For this Writ, *vide Reg.*
Orig. fo. 59, 60. F. N. B. fo. 54.

*How the Sheriff is to demean himself in
Proclamations.*

In real Action. *Vide Dower.*

As to Acts of Parliament in former Times.

Procla-
mations,

Proclamations ought to be with Writ to the She-
riff to proclaim. 2 Roll's Rep. 172.

Yet, if a Statute be not proclaimed, the Offen-
ces against it are punishable. *Dr. and Stud.* 146. b.

See concerning Proclamations to be made by the
Sheriff. *Dalt.* 379, 380.

And the late Statute for dispersing riotous and
tumultuous Assemblies.

How the Sheriff shall demean himself in a Writ of Enquiry of Waste; and of the Sheriff's Return thereupon: And of the Writ of Estrepment.

In an Action of Waste upon Issue joined, a Jury is summoned to try the Cause, and in the *interim* to view the Place wasted, and the Sheriff is to return the View. As to the Precedent, *vide* 2 Sanders 254. Green and Cole.

The Manner of the View. The Sheriff must go in Person to the Place wasted, by Stat. W. 2. c. 14. *accedat ad Locum vastatum*, together with the Jurors. 2 Inst. 390. Dalt. 292.

Not necessary to return the View. Six Jurors at the least ought to have the View. And the Jury may view the Place wasted when the Officer is not present; and the Court upon the Trial ought to examine, if the Jurors had the View or not. But though the Jury ought to have the View, yet it is not necessary for the Officer to return it. 9 Sanders 254, 255. Green and Cole. *Vide* Old Nat. Br. 173. and late Act for Amendment of the Law.

Waste in a Wood. In Action of Waste assigned in a Wood, the Jury viewed the Wood only, without entring into it: And it was held the same was sufficient. It would be too tedious for a Jury to view every Stub of a Tree that had been felled. Yet if Waste be in several

In several Corners. several Corners of a Wood, then the Jury is to have the View of every Corner; *aliter* where Waste is assigned in the whole Wood. And if Waste be assigned in every Room of an House, the View of

In every Room in a House. the House generally is sufficient. And by Dyer, if Waste be assigned in several Places, and of some of them the Jury had not the View, of that they may find no Waste done. 1 Leon. 276.

If an Issue ariseth in a Foreign County, the Jury examined of the View; and if the Jurors be not examined of the View when they should be examined, it is Error.

Return of the Writ of Enquiry in Waste.

Virtute Brevis Dom' Regis mihi direct' Ego A. B. Armig' Vic' Comitatus pradiet' (tali die & anno) in propria persona mea accessi ad Locum vastatum in directo Brevi nominat'. Et apud S. (the Vill wherein the Place lies) feci Inquisitionem, &c. prout istud Breve in se exigit & requirit.

Resid' Executionis istius Brevis patet in quadam Inquisitione huic Brevi annex'.

Inquisitio indentata capit' apud G. in Com', &c. (tali die & anno) coram A. B. Vic' Comitatus pradiet' Virtute cujusdam Brevis Domini Regis ei inde direct', & huic Inquisitioni consut' per Sacramentum A. B. &c. (ad numerum 12) qui dicunt super Sacramentum suum qd' J. R. in Brevi pradiet' nominat' fecit vastum venditionem & destructionem in omnibus in eod' Brevi specificat', viz. permittend' duas cameras pretii 3 l. & unum stabulum pretii 20 s. esse discoopertum pro defectu reparationum earundem domorum per quod grossum marem' eorundem Dom' per tempest' pluviales super illas descendentes putrid' devenit. Et dicunt super Sacramentum suum qd' pradiet' J. R. aliud neque plus vastum venditionem seu destructionem fecit in domibus pradiet', In cujus Rei Testimonium, &c.

Vide Dalt. 291. New Ret' Brev' 429, 430, &c.

Of the Enquiry of Waste.

How it
differs
from o-
ther
Writs of
Enquiry.
Jurors.

This Enquiry of Waste differs from other Writs of Enquiry, which are but meer Inquests of Office; but here it is a Verdict, and in Nature of a Verdict, and a Writ of Attaint lies. Therefore where upon a Writ of Enquiry of Waste, Thirteen Jurors were returned, where there ought to be but Twelve, it is Error. But in other Writs of Enquiry, it is usual to have more than Twelve, at the Sheriff's Pleasure; there must not be under Twelve, though it be but an Enquest of Office; for it is taken *jans mise des parties, id est*, without Issue joined. In a Writ of Enquiry of Waste upon *Demurrer* or *Nihil dicit*, the Sheriff may enquire of it at another Place than where the Waste was done. *Cro. Car.* 414. *King and Frith.* 2 *Inst.* 390. *Cro. El.* 290. *Warriford and Haddock.* *Dalt.* 294. *Dyer* 20.

Upon De-
murrer,
&c.

Damages
entire.

Now as to the Juries finding Damages, the Law is, that if Waste be assigned in three Houses and two Gardens, &c. and upon the Writ of Enquiry, Waste was found in the Houses and Gardens, and entire Damages given, it is well; for it is the usual Course to find entire Damages, and not several for every of them. *Cro. Car.* 414. *King and Fitch.* *Lib. Intr.* 620. 8 *Rep.* 61. But where the Writ of Waste and Count is in *Domibus, Boscis & Gardinis*, and upon the Writ of Enquiry the Waste is found in *Domibus & Gardinis*, and nothing in *Boscis*, there the Plaintiff shall be in *Misericordia*; because he counts for Waste in Places where no Waste was committed in one of them. But where Waste was assigned in cutting down Twenty Trees, and the Waste is found in cutting down two Trees, *aliter*.

Plaintiff
in *Misericordia*.

Aliter.

If

If the Jury find Damages only to 8 s. the Plaintiff ought not to have Judgment; for it ought to be above 40 s. *Winch. Rep. 5. Sir G. Topping and King.*

If Waste be committed in Two Villages, and Where to the Sheriff hath executed his Office ill in one Village, and well in another; all shall be enquired of *de novo*, because the whole Inquisition was but one Inquest at one Time: If Waste be assigned in divers Towns, the Sheriff and Jury must view all the Places wasted in every Town; but he may enquire thereof in any one of the Towns. *2 Inst. 390. Dalt. 293.*

Note, Action of Waste lies not in antient *Demesne*, because upon Default at the Grand Discreetness, there cannot be a Writ to the Sheriff, to enquire of the Waste as the Statute appoints. So *2 Inst. 386.* That the Court fails of the Incidents to an Action of Waste, to award a Writ to the Sheriff to enquire of the Waste. *2 Sanders 254. Grenes's Case. 4 Rep. Fulwood's Case.*

What Return shall be good, or not.

A Writ to the Sheriff to enquire of Waste, who returns, *Mandavi Ballivo meo Libertatis, &c. qui nullum dedit responsum*, it is an ill Return; and the Sheriff was amerced, and a *sicut alias* awarded; because in the executing this Writ he is both Officer and Judge, which Power cannot be committed to a Bailiff of a Liberty; and this Writ is a *Non omittas* in it self, and he hath Power to return into the Franchise. But if after the Party appears, it is good. *2 Brownl. Rep. 240. Trin. 11 H. 7. f. 42. Fitz. tit. Return de Vic 53, 92. 11 H. 4. 21. Dalt. 294.*

The

Wastes to
be reco-
vered,
and how.

The Place wasted, and the treble Value is to be recovered; now if Waste be made *sparsim* in a Close or Wood, the treble Value shall be levied by *Fieri fac'* or by *Elegit*, and not by *Capias*; because *Capias* lies not upon the Original. 1 Brownl 240.

If Sheriff
may vary
from the
Return
of the
Bailiffs.

The Sheriff makes a Precept to a Bailiff to summon a Jury, who returned a Panel which was Parcel of the Record; and the Sheriff took the Enquest of some not returned. It was the better Opinion, That the Return was good; tho' some said, the Sheriff may vary from the Return of the Bailiff, as he is one that makes the Array, and is Judge also. 8 Rep. 157. Edw. Altham's Case.

Estrepment.

Where it
lies.

The Writ of Estrepment is a Prohibition to do Waste, and lies in Two Points:

When it
may be
had.

1. When a Man having an Action depending (as a *Formedon*, Writ of Right, &c.) sues to inhibit the Tenant for making Waste during the Suit; and this is either Original, and may be sued out of *Chancery*; or Judicial, granted out of the Court where the Plea dependeth. 2 Inst. 328, 329.

Recovery
in
Waste.

2. When the Demand is to recover Seisin of the Land in Question, and before Execution sued by *Habere fac' Possessionem*, for fear Waste be made before Possession, he sues this Writ. And a Man can recover Damages for no more than is contained in his Count; and he cannot assign any Waste made after the Writ purchased. 5 Co. Forliambe's Case. Dalt. 233.

There

There is likewise, when Fear is that Waste Prohibited will be done, to prevent it, a Prohibition directed to the Sheriff, not to permit Waste to be done. And the Form, *vide 2 Inst.* 299.

The Sheriff, by Writ of Estrepmēt, may re-Posse Comitatus the Committing of Waste, and may imprison, *mitatus*, if he cannot otherwise hinder it. 3 *Bulst.* 199. And he may take the *Posse Comitatus* to hinder it. 5 *Co.* 115. *Dalt.* 233.

In Waste *Estrepmēt* was awarded, and upon Attachment Affidavit that the Writ of *Estrepmēt* was delivered to the Sheriff, and that he gave Notice to the Party, and yet he continues to make Waste; Attachment was awarded. 1 *Brownl.* 168.

If the Tenants of the Land, notwithstanding Where no Notice of a Writ of *Estrepmēt* directed to the Sheriff, commit Waste, this is no Contempt; and notwithstanding the Court will not commit them, because it was this Writ. not immediately to them, as it might have been. *Hob.* 85. *Earl of Cumberland's Case.*

Note, If the Sheriff be Plaintiff in the Action When to of Waste, the Writ of *Estrepmēt* shall issue to the Coroners. the Coroners.

But this Writ of *Estrepmēt* is rarely used, and Rarely in such Cases Injunctions out of Chancery are frequently granted. frequently granted.

It seems *Estrepmēt* lies not in a Writ of Error, Lies not of a Judgment in Partition. *Siderfin* 367. in Error.

The Sheriff's Office in the Writ de Excommunicato Capiendo.

The Sheriff need not bring the Body into the Excommunication. King's Bench at the Day of the Return, but shall only return the Writ thither with Declaration. briefly, in what manner he hath served and executed the same. 5 *El.* c. 23.

If

The Office and Duty of Sheriffs, &c.

If the Sheriff shall return *Non est inventus*, then a *Capias* shall be awarded with Proclamation therein, commanding the Sheriff in the County-Court, or at the Assizes or Quarter-Sessions, to make open Proclamation Ten Days before the Return at least, that the Party yield his Body to Prison in Six Days. And after the Six Days the Sheriff, &c. shall make Return what he has done thereupon, &c. (the Offender to forfeit 10 *l.* for such Default) and so a *Capias* shall go *infinite* with like Proclamation: And a Forfeiture of 20 *l.* for every other Default to be estreated presently. *Stat. 5 El. cap. 23. Dal. 381.*

If the Offender yield his Body, the Sheriff shall presently commit him to Prison without Bail.

If the Sheriff make an untrue Return, That the Party has not yielded his Body on any Proclamation made, where indeed he has yielded, &c. he shall forfeit to the Party grieved 40 *l.*

The Writ of *Excommunicat' capiendo* must be taken out of *Chancery*, and recorded in the King's Bench before it be delivered to the Sheriff. 1 *Keb. 613. 5 El. c. 23. Lewes versus Stephenson.*

Neither a *Vi Laica removenda*, nor *Excommunicat' Capiendo* were returnable before the Statute of 5 *El. c. 23. 3 Bulst. 92.*

He that is certified into the *Chancery* by the Bishop to be excommunicated, and after is taken by Force of the King's Writ of *Excommunicat' Capiendo*, is notailable by the Sheriff or Gaoler, by the King's Writ. But if the Party offered sufficient Caution, *de parendo mandatis Ecclesie in forma Juris*, then should the Party have the King's Writ to the Bishop to accept his Caution, and to cause him to be delivered. And if the Bishop will not send to the Sheriff to deliver him, then he shall have a Writ out of *Chancery* to the Sheriff to deliver him. Or if he be excommunicated for a

Tem-

Temporal Cause, or for a Matter whereof the Ecclesiastical Court hath no Conusance, he shall be delivered by the King's Writ without any Satisfaction. 2 Inst. 188, 189. See further touching Excommunicat' Capiendo's. 1 Salk. 293, 294, 295.

C H A P. XXVIII.

Of Returns of Clericus Beneficiatus, and other Returns as to Clerks. The Return of a Writ of Entry, Assize, and Quare Impedit. The Sheriff's Office as to Election, and Returning of Burgesses and Knights to the Parliament. The Form of the Indenture for the Knights of the Parliament, and for the Burgesses: The Sheriff's Return of the Writ for electing of Parliament-Men.

Return of the Sheriff as to Clerks.

Virtute istius Brevis mihi direct' Justic' infra-script', certifico qd' infranominat' T. H. Clericus est beneficiat' in Episcopatu London, nullum habens Laicum feodum in Balliva mea ubi potest summon' nec est inventus in ead'.

A. B. Armig' Vic'.

Vide Dalton 219. New Ret. Brev. 174, 175.

The Sheriff returneth, That the Parson ante ^{Parson} adventum Brevis, or post receptionem Brevis, or before the Return of his Writ, had assigned his Benefice. Et quod non habet nec habuit bona neque catalla infra, &c. it is a good Return. Dalton 219.

In Trespass or Debt against a Clerk, *Nihil habet* is a good Return. *ibid.*

Clericus beneficiatus, and Writ to the Bishop.

In Action brought against one wherein a *Capias* lies, (Ex. gr. in Account) the Sheriff returns *qd' est Clericus beneficiatus nullum habens Laicum feodum*, in which he may be summoned: In this Case the Plaintiff cannot have a *Capias* to take the Body of the Person, but he shall have a Writ to the Bishop, to cause the Person to come and appear. But if he had returned, *qd' Clericus est nullum habens Laicum feodum*, then is a *Capias* to be granted to the Sheriff, because it appeared not by the Return that he had any Benefice, so as he might be warned by the Bishop his *Diocesan*, and no Man can be exempt from Justice. But in the Case of the King where he is Party, the Sheriff cannot return *Clericus Beneficiatus nullum habens Laicum feodum*, as on Distress for Issues lost on a Juror. 2 Inst. 4. 627.

Aliter, and Writ to the Sheriff.

Simile.

Writ to Bishop to cause Execution.

If a *Scire fac'* be brought upon a Recognizance, or upon a Judgment in a Writ of Annuity, and the Sheriff return, That the Defendant is *Clericus & beneficiatus nullum habens Laicum feodum*, &c. the Plaintiff shall have a Writ to the Bishop to warn the Defendant; and upon Warning, or Two *Nihils* returned, and Default made, or if he appeareth and sheweth no Matter wherefore Execution should not be granted, then a Writ shall be awarded to the Bishop to levy Execution *de bonis Ecclesiasticis*. *Vide Dah. ut supra.*

Return of a Writ of Entry.

Cepit in manus.

The Count was of a Third Part of a Messuage and one Stable. *Petit Cape* was awarded to the Sheriff, and he makes his Warrant to a Bailiff of a Liberty; he returns *quod cepit in manus Domini*

mini Regis the said Messuage, and saith nothing of the Stable: And for this Cause Judgment was reversed. *Jones Rep. p. 357. Taite and Heynes.*

In a Writ of Entry *sur Disseisin*, it was adjudged *Sur Disseisin* Error, because the Sheriff returned not the Names *sin.* of the Summoners or Veyors. *Cro. Eliz. 557. Merris's Case.*

Return of a Writ of Assize.

The Defendant pleaded to the Writ of Assize, That the Writ was returned *coram nobis apud Westm'*, not saying *ubicunque*; *sed non allocat'*. The Court being here, it is well enough; and the Reason is, because it was for the Plaintiff's Convenience that it was *ubicunque*. 2. It was *Summon' XII.* without an *M.* over; which *per Cur'*, is well enough in Numeral Letters. 3. It was *qd' sint ibi Aud.* which should be *ad Audiendum*, as *Reg. 198. b.* But *per Cur'*, this may be intended *Auditur'*, and so is well enough without *ad.* 4. It was *Si. fec'*, whereas it should be *Sci. fecerit*; *sed non allocat'*, and a *Respondeas ouster* awarded. 3 *Keb. 326. Creek and Norfolk.*

Quare Impedit.

In a *Quare Impedit*, The Defendant must be summoned by the Sheriff. And this Summons may be made in Church, or to the Parson; the Sheriff returns *Nihil* upon the Summons, and upon the Attachment, and upon the Distress, the Plaintiff shall recover. *Dalt. 270.*

If the Defendant comes not at the Distress returned against him, the Plaintiff shall have a Writ to the Bishop, without making any Title. *Dyer 241.*

A Writ

A Writ of Enquiry of Value in a *Quare Impedit* was executed the first Day of the Return, but the Jury did not give their Verdict till Two Days after.

Return of a *Quid Juris clamat. Vide Dalton* cap. 71. fol. 270.

The Sheriff's Behaviour in the Writ and Inquisition, and Return of Malefactoribus in Parcis.

Vide Cro. Car. 439. The King against the Inhabitants of *Epworth*; and 17 other Villages, and Statute *W. 2. c. 46. Co. Mag. Chart. Vide Dalt. Of Sher. 545. Mesme Case.*

The Sheriff's Office as to the Election and Returning Parliament-Men, &c.

Proclamation to be made.

At the next County-Court, after Delivery of the King's Writ to the Sheriff, for the Electing Parliament-Men, Proclamation shall be made by the Sheriff in full County, of the Day and Place of Parliament, and all they who are present shall attend, and in full County proceed to the Election of their Knights for the same County; and after they are chosen, the Names of the Persons chosen shall be written in an Indenture under the Seals of the Electors, and tacked to the said Writ of Parliament. *Stat. 7 H. 4. 15. Dalt. 331.*

Upon any Return contrary to this Statute of 8 H. 6. c. 7. the Sheriff shall forfeit 100 l. to the King, and have one Year's Imprisonment; and shall forfeit another 100 l. to the Person chosen Knight of the Shire, and not duly returned. The Chusers must have 40 s. *per Annum* Freehold within the said County. *Dalt. 332.*

The Choice must be between 8 and 11 of the Clock in the Forenoon.

Every Sheriff, after Receipt of the King's Writ Warrants for electing Knights of Parliament, ought forthwith to be made out his Warrants under the Seal of his Office, to every Mayor and Bailiff of Cities and Boroughs within the County; reciting in his said Warrants the Writ of Parliament, commanding them thereby to chuse Citizens and Burgeses to come to the Parliament; (*scil.*) if it be a City, to chuse Citizens for the same City by Citizens; and if it be a Borough, to chuse Burgeses by Burgeses (or Freemen of the same Borough.) And those Mayors and Bailiffs must make a lawful Return of that Precept to the Sheriff by Indentures made between them and their Sheriff of their Election, and of their Names which are elected, 23 H. 6. 15. And the Sheriff must set his Hand and Seal of Office to one Part of the Indentures, and then deliver it to them to be kept; and to the other Part the Mayor, or Citizens or Burgeses must set their Hands and Seals, and deliver it as their Deeds to the Sheriff, to be certified and returned by him with the Writ of Summons to the Clerk of the Crown; and all this under Pain of 100 l. to the King, and Imprisonment for one Year; and the Party grieved (or other Person in his Default) shall recover another 100 l. But they must commence their Action within three Months after the Commencement of the Parliament, and Mayor and Bailiffs shall pay 40 l. *Dyer* 113. *pl.* 118. *Dalt.* 331.

Note, Action on the Case lies against a Sheriff for returning other Knights for the County than were elected; and it is against the Statute of 7 H. 4. for false Return, and 23 H. 6. *cap.* 15. gives Debt in the Case; and it is not in the Negative, and

H h

fo

The Office and Duty of Sheriffs, &c.

so does not exclude from other Remedy. 2 *Siderfin* 168. *Nevile and Strowd*.

See the late Acts relating to the Election and Return of Parliament-Men.

Now the Names of the said Knights shall be returned into the Chancery by Indenture sealed between the Sheriff and the Chusers of the Knights in Manner following.

The Form of the Indenture for the Knights of Parliament.

HÆC Indentura facta in pleno Comitatu Warr' tent' apud Burgum de Warr' die, &c. Anno Regni Domine Annæ, &c. inter A. B. Mil. Vic' Comitatu prædict' ex una parte, & J. C. Mil. A. C. Armig' F. P. F. K. &c. & multas alias Personas Comitatu prædict' & Electores duorum Militum ad Parliamentum in Breui huic Indenturæ consui' specificat' ex altera Parte, qui ut major Pars totius Communitatis prædict' tunc ibid' existens jurat' & examinat' secundum vim formam & effectum diversorum Statutorum inde edit' & provisor' Eligerunt E. P. Mil' & J. C. Mil' infra Comitatu prædict' commorantes gladiis cinct' Milites habiles & magis idoneos & discret' dantes & concedentes prædict' duobus Milit' plenam & sufficient' potestatem pro se & tot' Communitat' Comitatus prædict' ad faciend' & consentiend' iis quæ ad Parliamentum in dicto Breui content' de communi Concilio Regni dict' Domine Regine nunc Magnæ Britannia contigerit ordinari, super negotiis in dicto Breui spec'. In cujus rei testimonium uni parti hujus Indenturæ penes dictam Dominam Reginam remanen' partes prædict' sigilla sua apposuerunt, al-

teri vero parti ejusdem Indenturae præd' Vic' sigillum suum apposuit. Dat' die anno & loco suprad', &c.

Vide Dalton 336. New Ret. Brev. p. 3, 4. &c.

The Form of Indenture for the Citizens and Burgeses.

THIS Indenture made, &c. (reciting the Day and Year, and the Queen's Style at large, *prout supra*) between, &c. *Witnesseth*, That by Virtue of a Warrant to me directed from Sir O. R. Knight, Sheriff of the County of *Warwick*, for the Electing and Chusing of two Burgeses, Men of good Understanding, Wit, Knowledge and Discretion, for Causes concerning the publick Wealth of the Realm, to be at her Majesty's High Court of Parliament, to be holden at *Westminster* the Day of next coming. I E. L. Mayor of the Borough or Town of *Warwick*, with the whole Assent and Consent of the rest of the Burgeses there, have made Choice and Election of and of to be Burgeses of our said Borough of *Warwick*, to attend at the Parliament, according to the Tenor of the said Warrant to me directed in that Behalf. *In Witness* whereof, I have to these Presents set our Common Seal of our said Borough, the Day and Year first above-written.

Dalt. 336. New Ret. Brev. in Latin and English, 5, 6.

Another Form for Burghers, &c.

THIS Indenture, &c. between *H. A.* High-Sheriff of the County of *B.* of one Part, and *R. T.* and *W. L.* Constables of the Borough and Parish of *Ailesbury* in the said County; and *F. L. C. C.* &c. Gentlemen, (and Forty-four others named) Burghers and Inhabitants of the said Burrough of *A.* of the other Part: *Witnesseth*, That by Virtue of a Precept to the said Constables directed and delivered by the said Sheriff under the Seal of his Office in that Behalf, they the said Constables, Burghers and Inhabitants have of their full Consent duely chosen Sir *J. W.* Baronet, and *S. M.* Esquire, two Burgesses, six and discreet Men to serve for the said Burrough in the Parliament, to be holden at his Majesty's City of *Westminster* the eighth Day of *December* now next ensuing according to the Tenor of the said Precept, giving and by these Presents granting to the said Burgesses so chosen, full Power for themselves, and the Commonalties of the said Burrough, to do and consent as in the said Precept is specified. *In Witness* whereof to one Part of these Presents remaining with the said Sheriff, they the said Constables, Burghers and Inhabitants have thereunto set their Hands and Seals; and to the other Part remaining with the said Constables, the said Sheriff hath set the Seal of his Office, the Day and Year first above-written.

28 Nov. 1726.

Examined by the Records in the Petty-Bagg Office per
C. Crump.

*Concordat cum Rec'
& examinat' per
Dan. Bland.*

The

The Sheriff's Return of the Writ for electing a Parliament-Man Knight of the Shire.

Virtute istius Brevis mihi direct', Eligi feci duos Milites Gladiis cinctos magis idoneos & discret' de Comitatu meo präd' (videl') W. F. & J. S. qui quidem Milites plen' & sufficien' potestat' pro se & Communitat' Com' präd. habeant ad faciend. & consentiend' iis quæ ad diem & locum infra content' de Communi Concilio Regni Regina Magnæ Britannia ordinari contigerit. Et präd' W. F. & J. S. Manucap' sunt per J. P. W. B. R. D. & R. N. ad essend' ad Parliamentum Domina Regina apud Westm. ad diem infracont' ad faciend' prout istud Breve in se exigit & requirit. Feci etiam præceptum (to the Mayor or Bailiff) de G. quod de Burgo de G. eligi fecerint duos Burgenses de discret' & magis sufficien' quod sint ad Parliamentum dict' Dom' Regin' ad diem infra-content' ad faciend' & consentiend' ut präd' est qui quidem (Mayor, &c.) sic mihi respond' quod Eligi fecer' de prædict' Burgo de G. duos Burgenses discret' & magis sufficien' ad essend' ad Parliamentum prædict' (viz.) S. W. & R. W.

R. Q. Armig' Vic'.

Vide Dalton 229, 230. New Ret. Brev. 2, 3, 4, 5.

See also Bohun's Parliamentary Debates, where many Forms of Returns for the several Counties, Cities, Burroughs and Towns Corporate, in England and Wales, are inserted.

C H A P. XXIX.

Customs of London. Of their Officer, Prison, Court, of the Sheriff's Court. How to lay the Custom of the Sheriff's Court. The Difference between the Mayor's Court and the Sheriff's Court. Sheriff's Court when kept. The Manner of entring Actions in the Compters.

Customs of London, as to Officers, Courts, Procefs and Prisons, &c.

Vide 9 Rep. 62, 63, 67. Tit. Arrest, & vide Calth. & Privilegia Londini, lately published.

Two Persons and one Sheriff.

BOTH the Sheriffs of London are in Law but one Sheriff, and the one is not of London, and the other of *Middlesex*, as is vulgarly supposed. *Hob. p. 70. Lamb and Wiseman.*

The Return of one not good.

And the Sheriff of London is known in Law to be two Persons; therefore if one Sheriff of London make his Return without his Fellow, this cannot be holpen by *Jeofail*, it being as no Return at all, or a Return without the Sheriff's Name subscribed: And London had no Sheriffs in the 13th of *Ed. 1.* 1 *Leon. 284.*

Mayor and Commonalty have the Office.

In London, the Mayor and Commonalty have the Office of Sheriff of London and *Middlesex*, and Two Sheriffs are yearly chosen. 3 *Rep. Westby's Case.*

London and *Middlesex* several Counties.

Upon a *Capias ad satisfaciendum* to the Sheriff of *Middlesex*, to take *J. S.* if the Sheriff take him and put him in *Newgate*, which is the Common Prison for London and *Middlesex*, and after another Writ of *Execution* comes to the Sheriff of London,

London, although the Sheriffs of London are also Sheriffs of *Middlesex*; and *Newgate* (where the Prison is) is the Prison for both Counties; yet the Prisoner shall not be said to be in Execution upon this new Writ in London, nor may the Sheriff of London serve it upon him, because he is in another County. Yet *Newgate* is a Prison for both London and *Middlesex*.

For when the Commitment is to *Newgate* by Force of a Writ to the Sheriff of *Middlesex*, he may not be said in any Respect to be in the County of London: for the Counties continue several, and the Person several, in respect of the several Commitments, For there are two several Sides, and a Partition between them. *1 Roll. Ab. 894. Coas's Case. Trin. 16 Jac. B. R.* Commitment by Sheriff of *Middlesex*, is not a Commitment in London.

By the Custom of London, the Writ of *Executi-* Executi-
on is directed to the Sheriffs of London, and not on to the Coroner, who is the Mayor. *2 Roll. Abr. 806.*

The Return of the Outlawry out of London in *Outlaw-C. B.* is generally made without saying, *Per judi-ry. cium Coronatorum.*

Sheriffs Court.

The Custom is, when a Man is impleaded before the Sheriffs, the Mayor upon Suggestion of the Defendant may send for the Parties, and for the Record, and examine the Parties upon their Pleas; and if it be found upon his Examination that the Party-Plaintiff is satisfied, that he may award that the Plaintiff shall be barred. And this is called, *The Court of Conscience.* *4 Inst. c. 50. 8. Rep. City of London's Case.* Court of Conscience before the Mayor.

The Plaintiff in Assault and Battery in his Re-
plication saith, 'The City of London is an ancient
City, of the Sheriffs.

Two
Courts.

City, and have Pleas, and that there was a Plaint in such a Court before *F. M.* by Virtue of which Process the Plaintiff was taken. He should have alledged a Custom to hold a Court before the Sheriffs, and that *F. M.* was then Sheriff: It is said, *Coram F. M. uno Vicecom'*, it is well enough, there being two Courts, tho' but one Sheriff. 1 *Keb.* 564. *Osborn and Parker.*

As to the Difference between the Sheriffs Court, and Mayor's Court. Vide Privilegia Londini, 310, 311.

Difference of the Entries in the Mayor's Court and the Sheriffs Court.

A Clerk of the Mayor's Court said, that the Figures 264 (in their Entries) signifie the 26th Day of the 4th Month, 26 the Day, and 4 the Month, accounting *November* (in which the Mayor is chosen) the First, and so the Fourth Month is *February*.

But in the *Sheriffs* Court they count their Months beginning in *October*.

And accordingly it was ordered, that *Ashfield* the 20th Day of *February*, i. e. the 4th Month, commenced a Plaint, &c. 2 *Rep. Rep.* 380. *Ashfield's Case.*

Writ of Error to be brought in the *Hustings*

If an erroneous Judgment be given in any of the *Sheriffs* Courts of the City of *London*, the Writ of *Error* to reverse this Judgment must be brought in the Court of the *Hustings* before the Lord Mayor, for that is the Superior Court *Pract.* *Reg.* 283. 4 *Inst.* 247.

Direction of Writs.

Quodlibet Breve quod tangit liberum Tenementum dirigitur Majori & Vicecomitibus, & alia Brevia tantum Vicecomitibus.

The Two Sheriffs of *London* do each of them keep a Court of Record, where they hold Plea of all Personal Actions, and the two Prisons (called the *Counters*) belong to them. Sheriffs Courts, when kept.

And they have two Court-Days in every Week a-piece: For the *Woodstreet-Counter*, on *Wednesdays* and *Fridays*; for the *Poultry-Counter*, on *Thursdays* and *Saturdays*. Two Court-Days a-piece, &c.

In a *Plaint of Debt* levied before any of the Sheriffs, the Custom is that the said Sheriffs *Ore* Upon a Plaint be-
tenuis, send to the Serjeants of the Counter, either fore any
to summon or attach the Defendant without War- of the
rant; and upon *Nihil* returned within the City, Sheriffs.
that then the Serjeants, and every of them, by
the Commandment of the Sheriff, have used to
attach and arrest the Defendant, to have his Body
at the next Court before the Sheriff at the *Guild-
hall*, &c.

In this Manner they certify their Records: But Modern the usual Practice is, to enter an Action in the Of- Practice.
fice for that Purpose at one of the *Counters*; which
Action must be entred with Care: For it is the
Original in that Court by which you must declare,
and from whence there must be no Variance.

And when an Action is entred, then any one of the *Serjeants* may arrest the Defendant, and bring him into Custody until he find Bail to answer the Condemnation; which Bail is to be taken by one of the Clerk-Sitters. Of en-
tring
Actions
in Coun-
ters.
Bail.

The Defendant may be arrested by the Custom of *London*, after Entry of the *Plaint* in the *Porter's Book*, before the Entry of it in Court before the Sheriff: And after *Plaint* entred, the *Serjeant* may arrest without Precept. Arresting
by Serje-
ants.

The *Serjeant* need not shew his Mace, because he is sworn and known, altho' not to the Party; Serjeant
shewing
his Mace.
and

and a known Bailiff need not shew his Warrant although demanded.

But in 6 Rep. 52. Countess of Rutland's Case, a General Arrest by a Serjeant by shewing the Mace, and touching his Body with it, and saying, *Sir, I arrest you*, is insufficient; for he ought to shew at whose Suit, out of what Court, for what, and of what Return, &c. that the Party may know, &c. *id est*, if he demanded it. *Vide antea*.

Escape.

Whether
the Court
can dis-
charge
one ar-
rested,
who is
coming
and re-
turning
to the
Court.

In Escape the Defendant pleads the Custom of London, that the Mayor and Sheriffs of London have used to enlarge Prisoners that were arrested, in coming and returning from their Courts, having Causes there depending; and sets forth a Plaint in London against the Defendant, and that he was arrested, and appeared, and pleaded to Issue; and as he was coming to Court to defend that Action, he was arrested, as is supposed in the Declaration. And *per Cur'*, the Court cannot discharge one arrested, except he be arrested in the Face of the Court. 1 Brownl. 15. Wilson and the Sheriffs of London. Et vide Raym. Rep. 101. That if a Man in Westminster-Hall be arrested in the Face of the Court, the Court may discharge him, but not otherwise. But the Court will, on the Plaintiff's Motion, order a Tipstaff against one walking in Westminster-Hall, against whom there is a Judgment of the Court.

See further of the Sheriffs Courts in London. *Privilegia Londini*, 310, 311.

C H A P. XXX.

The Sheriffs Duty as to the Assizes; and as to Sessions of the Peace.

THE Form of the Warrant made by the Sheriff, or Under-Sheriff, for summoning the Affizes, *vide Dalton* 296. A Schedule may be filed to the Backside of the Warrant; wherein he shall set down the Names of the Grand Jury and Petty Jury of Life and Death; to whom he must give Warning by his Bailiff. Warrant for sum-

The High Sheriffs themselves are to attend the Judges at the Assizes: And also Stewards, Bailiffs, and other Ministers of any Liberties or Franchises, &c. shall be attendant to the Justices of Assize and Gaol-Delivery of the same Counties, wherein such Liberties and Franchises shall be. And shall be fined by the Judges in Case of Failure. *Dalt.* 369. To attend the Judges,

Every Sheriff (and all other Persons) which have the Custody of the Gaols (or Prisoners for Felony) ought to certify the Names of every of their Prisoners, which are in their Custody for Felony, to the Justices of the next Gaol-Delivery, upon Pain of 5 *l.* for every Default. *Ibid.* To certify the Prisoners Names.

For the Return of the Summons of Assizes. *Vide Dalton* 195. *New Ret. Brev.* 397. Return of Sum-

The Return of the Precept for the Gaol-Delivery. *Dalt.* 196. *New Ret. Brev.* 400. mons.

As to his Office about the Sessions of the Peace.

For the Precept of the Sheriff for summoning the Sessions of the Peace, *vide Lambert* 367. *Im-* Precept summon-
press. 1599. That it ought to bear Date under the ing the
Names Sessions.

Jurors.
Constables, &c.

Names of two Justices of the Peace at least, and not of the *Custos Rotulorum* alone. It must be to summon 24 Jurors, and to command all Constables, Bailiffs or Coroners, to give their Attendance upon the Justices; and the Form of the Return of the Summons, *vide Dalt.* 197, 198. *New Ret. Brevi* 402, 403.

Riots.

In some Cases the Sheriff is to join with the Justices of the Peace, as in Case of Riots, &c. 13 H. 4. c. 7.

Forcible Entries, &c.

He is to attend and assist the Justices of the Peace, to arrest such as shall make any forcible Entries or Detainer. 15 R. 2. c. 1.

Grand Inquest.

He is to summon 24 to be of the Grand Inquest.

As to several other Sorts of Precepts, and Acts of Parliament.

As to other Sorts of Precepts, which the Sheriff is to execute in respect of Commissioners of Sewers, Commissioners of Bankrupts, and several other Acts of Parliament, *vide Dalton of Sheriffs*; and see the Acts themselves. The Duties of his Office being so various, and especially in many late Acts; it is best therefore to refer to the Acts themselves, which no Gentlemen ought to be without.

For Variety of Returns of all Sorts, *vide Dalton of Sheriffs*, and the new *Retorna Brevium*, about to be re-published.

In the last of which Books are contained several special Modern Reports; as,

J. Of Extents, Page 52, 53, &c.

J. Inquisition, *Super breve de diem clausit extremum*, 71.

J. *Fieri facias*, 85.

J. *Levari facias*, 88, 89, &c.

J. Scire

Ch. 30. Sheriffs Duty as to Sessions, &c. 477

§. *Scire facias*, 97, 98, &c. 107, 108, &c.

§. *Venire facias*, 112.

§. *Vendition' exponas*, 113, 114, 115, &c.

§. Special Return of an *Habeas Corpus* by the Keeper of Newgate, 280, 281, 282, 283, &c.

To which are now added many other Returns, for the most Part taken from the Report-Books, and Books of Entries, both Ancient and Modern.

C H A P.

C H A P. XXXI.

Of Sheriffs and Officers Fees. Remedy and Security for Fees. Extortion punishable, What Assumpsit good, as to paying Fees, or not.

Of Sheriffs and Officers Fees. See 1 Salk. 330, to 332. and the Statutes made 3 Geo.

AT Common Law a Sheriff might not take any Fees, but it was Extortion: But now he may take the Fees allowed by several Statutes. *Cro. Eliz. 654. Stanton and Sullyard, and the Statutes, 29 Eliz. c. 4. and 3 Geo. c. 15 & 16.*

Stat. 29 Eliz. c. 4. of 12 d. in the Pound. Extents or Executions. The Statute 29 *Eliz. c. 4.* says, *no Sheriff, Under-Sheriff, Bailiff of a Liberty, or any of their Deputies, shall either directly or indirectly take more for serving an Extent or Execution, than after the Rate of 12 d. in the Pound for every Pound under 100 l. and 6 d. for every Pound above 100 l. on Pain to forfeit treble Damages to the Party grieved; and besides, 40 l. between the Queen and the Prosecutor. This Act not to extend to Fees of Executions within Cities or Corporations.*

Warrant. Yet the Sheriff by the Equity of 23 *H. 6. c. 10.* shall take 4 d. for every Warrant. *Winch. 21.*

12 d. for every Pound of the first 100 l. and 6 d. for every Pound above the 100 l. Upon the Words of this Statute it was a Question much argued in *Latch. 17. 51. Welden and Vesey, Jones 307. Lister and Bromly. Cro. Eliz. 335. Gurney's Case. Cro. Car. 286. Lister's Case, Winch. p. 21, 50. Empson's Case, where the Statute gives 12 d. in the Pound for the first 100 l. and if it exceeds that, then but 6 d. whether this shall be taken, but only 6 d. in the Pound for all if that exceeds 100 l. or whether he shall have 12 d. for the first 100 l. and 6 d. for the rest?*

And

And it was adjudged, that he shall have 12 d. for every Pound of the first Hundred, and 6 d. for every other Pound above the Hundred: And so is the constant Practice. Though *Hobart* (in *Winch. 50. Empson's Case*) was strong against it, and that the Sheriff shall have but 6 d. in the Pound.

As to the Proviso, *That it shall not extend to Not to Executions within Cities or Corporations*, it was extend to held, that it was only to be intended for the exe- Corpora- cuting Judgments given in the Courts of the said tions for Corporation, and not to the Sheriffs of Cities or Executi- ons from Corporations for executing Judgments out of Su- their own perior Courts. *Jesson, Sheriff of Coventry's Case*, Courts. cited in *Lister and Bromley, Cro. Car. 287.*

Vide Latch. 17, 52. Poph. 173. Welden and Vesey,
the Case argued.

In an Action upon this Statute of 29 Eliz. a- gainst the Sheriff for excessive Fees, it was moved in Arrest of Judgment, because it said *ad Parlia- ment' tent' per prorogac'*, 15 Feb. 29 Eliz. and the Stat. 19 Rolls appeared (by Copy sworn) 29 Octob. 28 El. El. when the Parliament began, and an Adjournment to 17 began. Nov. 6. and no Prorogation at all.

So 35 Eliz. 1. Sect. 11. it is said 29 Eliz. 6.

Vide 1 Andersf. 294. Raft. Abr. Elenchus Parliam. & Keb. 3. 742. Sprig and Eve.

Quare, When one Sheriff shall make the Ex- Extent by tent, and the other Sheriff the Liberate, who shall one Libe- have the Fees given by the Statute. rate by the other.

Note, The Fees shall be paid by him that sets By whom him at Work, and not by the Prisoner; of whom to be paid, the Bailiff on Arrest having taken 7 s. for Attor- ney's

ney's Fees, was convicted of Extortion. 1 *Keb.* 623. *Le Roy versus Wade.*

Poundage
out of a
Fine.

Poundage was allowed the Sheriff out of 100 *l.* (Fine imposed after Conviction on Indictment of Battery in *B. R.*) levied upon a *Fieri fac'*, and it was allowed out of the Money, in the Hands of the Clerk of the Crown, payed by the Sheriff; though there was no Precedent in *B. R.* for it. But the Barons always make such Allowance in the *Exchequer*, after the Monies paid in there by the Clerk of the Crown. Sir *Thomas Jones* 185. *Le Roy versus Wade.*

Of Sheriffs Security and Remedy for Fees, and what Fees they may take, or not; and what shall be Extortion in them or not, and how punishable.

Security. *What Security the Sheriff may take for his Fees, or not.*

Bond for Diet. The Warden of the *Fleet*, and the Warden of the Palace of *Westminster*, may take Bond for Diet and due Fees of the Office. *Hetley* 176. *Harris* and *Lea*.

The Sheriff shall take single Bill for his Fees, but not with a Penalty.

The Sheriff may take a single Bill for his Fees, and that is the ordinary Course, but not with a Penalty. To this Purpose there is a notable Case, *Empson* and *Bathurst*. *Winch.* 22.

Upon a Bond for Fees of a Statute to be extended.

The Condition of a Bond to the Sheriff is to pay 20 *l.* that is, for Money which is given to him for his Fees, which are due by the Statute of 29 *Eliz.* Defendant pleads the Statute of 23 *H. 6. c. 10.* the Case was; a Statute of 200 *l.* was acknowledged to the Defendant by *J. S.* and this was extended by the Plaintiff being Under-Sheriff, and it was agreed between *C. E. Brother*

ther to the Plaintiff, and the Under-Sheriff, before the *Liberate* executed, that the Defendant should enter into the said Bond to the Use of the Plaintiff. Three Points were resolved *per Curiam*.

1. This Bond is not within the Statute of 23 Not with-
H. 6. for the Party was not within the Ward of in Statute
the Sheriff. And so was *Beaufage's Case*. 23 H. 6.

2. The Sheriff may not take his Salary appointed by the Statute till a compleat Execution, *i. e.* till the *Liberate*, for the Words of the Statute are in the Negative, and doth not establish the Fees, but only tolerates them. And by *Hobart*, if the Where
Conisee sue an Extent, and then refuse to sue the Action
Liberate, to the Intent to defraud the Sheriff of may be
his Fees; the Sheriff shall have his Remedy by by She-
Action on the Case. riff.

3. This Obligation is void by the Common But this
Law, and Extortion, as *Dive* and *Manningham's* Bond
Case is. *Plowd.* 65. The Sheriff may take a Bond void for
with a great Penalty for the Appearance of the Extor-
Party, but not for his Fees, by the 23 of H. 6. tion.
for that Statute as to Fees is not repealed by 29
Eliz.

What Remedy the Sheriff shall have for his Fees.

Action of Debt lies for a Sheriff upon the Sta- Debt for
tute of 29 *Eliz. c. 4.* for Execution-Fees, altho' Executi-
the Statute doth not say he shall have the Fees, on-Fees;
nor any Action for them; but only saith, he shall
not take for any Execution made, any Considera-
tion or Recompence, besides what is therein men-
tioned, which it shall be lawful for him to take,
(*viz.*) 12 *d.* for 20 *s.* where the Sum doth not ex-
ceed 100 *l.* and 6 *d.* above 100 *l.* 1 *Roll. Abr.* 398.
Proby and Lumly versus Mitchel, 1 *Roll. Rep.* 404.

Case for
Fees and
Debt for
his Fees
not pro-
hibited.

The Sheriff shall have Action on the Case, but not Debt, upon *Assumpsit*, to pay his Fees due by the Law of the Realm, for to execute an Execution. *Moor* 699. But he shall have Debt for his Fees not prohibited by the Statute of 29 *Eliz.* *Moor* 853. *Staunton* and *Proby*. *Moor* 667. *Sullyard* and *Stamp*.

Where and in what Actions the Sheriff shall not take Fees.

Not to
arrest.

Where
not upon
his deli-
vering
War-
rants.

Not upon
Cap. Utlag.

Hab' fac'
Possession.

Oppres-
sion, &c.

Extorti-
on.

The giving Money to a Sheriff to arrest a Man, is against the Law. 1 *Roll. Rep.* 313.

A Sheriff cannot take Money for Fees upon Delivery of Warrants to his own Bailiff, but must stay till the Money is levied; *aliter* if it be to Special Bailiff. *Moor* p. 468. n. 669. *Sullyard* and *Stamp*.

No Fee is due to the Sheriff for executing a *Cap. Utlagat'* either for Warrant to execute it, or for the Return of it. Sheriff took 200 *l.* to execute *Hab' fac' Possessionem*. *Herly* p. 52. *Wildhere's* Case. *Litt. Rep.* 65. *Mesme* Case.

Per Cur', It is great Oppression to the Subjects, that the Sheriffs (to whom the Statute had given so much in the Pound, in Case of Execution against a Personal Estate) should take such Fees in Case of a Real Estate; and it was said, it was not to be found that they have any legal Fee upon this Execution; but the usual Fee which they ought to take, is 2 *s.* 4 *d.* 2 *Siderfin* 155.

What shall be said Extortion in Sheriffs and Gaolers, &c. and how punishable.

As to the Sheriffs taking Bonds *extorsive*, *vide supra* in *Tit. Stat.* 23 *H. 6. c.* 10.

By

By *W. 1. cap. 26.* no Sheriff, or any Minister of What the King, shall take any Reward for doing his Office, but only that which the King allows, upon Pain that he shall render double to the Party, &c. Fees are no Extortion, &c. but later Statutes have permitted them to take it in some Cases. But yet, such reasonable Fees as have been allowed by Courts of Justice of old and inferior Ministers and Attendants on Courts, if they be demanded, it is no Extortion. *Co. 1 Inst. 368. Shirley and Packer. 10 Rep. 101.*

If any Bailiff, or other Sheriff's Officer, shall take any Thing of any Person, to spare them for appearing at the Assizes, Sessions of the Peace, or the like, it is Extortion. For sparing Persons to appear.

If the Sheriff, or any of his Officers shall take any Money, or other Reward, for the Omitting of any Arrest or Attachment to be made; it is Extortion, and the Sheriff or Officer so offending, shall forfeit for every such Offence 10*l.* to the King and Informer. *32 H. 6. c. 10.* For omitting Arrests, &c.

As to the Punishment of Sheriffs for Extortion, it is either by *Indictment, Information, Imprisonment or Commitment.* Punishment for Extortion.

As to *Indictments*, what is good or not.

Indictment of Extortion against a Bailiff of an Hundred, *Quod colore Officii* he took *extorsive* ment. Money, and shews not for what Matter or Cause. *Per Curiam*, It is well enough, the Officer being Bailiff of an Hundred, especially being after a Verdict. But *quare* of this. *1 Keb. 557.* The King and Gover.

By *23 H. 6. c. 20.* on Extortion treble Damages are given to the Party, and the Justices of Peace may assess them; but they ought first to enquire of the Damages by a Jury. Therefore in *Bumpstead's Case. Cro. Car. 488.* Indictment was against the Sheriff for extortious Fees, on Two several Indictments: They awarded to the One treble Damages;

Quadruple. Error. mages; that is, where he took of one 20 s. *extorsive*, they awarded to the Party 3 l. and 4 l. to the King. And on the other, where it was found he took 8 s. 8 d. *extorsive*, they awarded he should pay to the Party 26 s. 8 d. So a quadruple Value, and 20 Fine to the King. And it was adjudged Error, *Causa qua supra*.

Contra formam Statuti 23 H. 6. The Indictment must be *Contra formam Statuti*, if they will proceed upon the Statute of 23 H. 6. *id. ibid.* The Court were doubtful, if this Statute extends to Extortion, unless taken upon Arrest. And Judgment was reversed.

Indictment at Quarter Sessions. The Sheriffs Bailiffs were indicted at the Quarter Sessions for Extortion. *Jones* 379. The King against *Lamfern*.

Information, Informers have the 3 l. An Informer on Conviction of a Prisoner for Extortion, or other penal Law, may have the 3d. Part of the Fine, according to the King's Privy Seal for that Purpose. And he had so of 10 l. set on a Bailiff for 3 l. taken for Execution done to his Person. 1 *Keb.* 357. p. 487.

The Prison mistaken. Information was brought against the Keeper of the Gaol, or Prison of the Castle of *Maidstone*, for Extortion on the Statute of 23 H. 8. And it was found by Special Verdict, that there is not any Castle in *Maidstone* but a Gaol, and the Defender was Gaoler there. *Per Cur'*, Judgment *pro Querente*. 2 *Roll. Abr.* 211. *Goodwin* and *May*.

Sheriff committed. In 2 *Brownl.* 283. The Sheriff was committed to the *Fleet* for taking illegal Fees. 2 *Brownl.* 283.

Serjeant committed for taking illegal Fees. A Serjeant of *London* was committed in Execution for a Fine in extorting Fees on an Arrest, and a third Part was allotted to the Prosecutor. His Wife petitioned the Court to mitigate the No Mitigation of Fine, but they could not. 3 *Keb.* 328. The King against *Welfon*.

The Sheriff of *Suffolk* was imprisoned for taking a *Guinea*, there being only 2 s. due to him, and he returned two *Guineas* to the Plaintiff, being double of what he had taken, on the 3 *Ed. 1. cap. 26.* and so he was discharged. 3 *Keb. 714. Butler's Case.*

Assumpsit and Consideration about paying Fees, shall be good, or not.

If a Sheriff, &c. assume for Money given to serve certain Process, this is not a good Consideration, as being against Law: For it is Extortion in the Sheriff to take it, and unlawful for the other to give it. *H. 10 Jac. Boothby and Alport. 1 Rol. Ab. 16. Shirley and Parker. Ergo Cro. Eliz. 654.* is not By a Law. *Stamp and Sullyard.* Executor sues Executor on by *Elegit*, and B. an Estranger as a Friend to the Executor, in Consideration that the Sheriff will execute the said *Elegit* presently, and of 6 d. paid him by the Sheriff assumes to pay 60 l. to him; whereupon the Sheriff executes the Writ. This Consideration is against Law, for the Sheriff ought to do his Duty without Reward; and this 60 l. is not any Discharge of Sheriffs Fees due by the Statute, being given by a Stranger, and not express for them. *1 Roll. Abr. 16. Bird and Cage,* and though it was alledged, That this Sum promised him is no more than what the Statute of 29 *Eliz.* allows him to take for his Fees; yet that helps not the Case, for that Statute only excuseth him for his Taking Fees, whereas the Common Law did not permit him to take any Thing for the Executing Writs. And the giving of 6 d. is no sufficient Consideration being joined with the other that is unlawful. *Cro. Jac. 103. Mesme Case.*

In Consi-
deration
that C. an
estranger
will arrest
a Man.

Promise
to a Stran-
ger to
procure
the She-
riff to
arrest
J. S. is
good.

A. is outlaw'd at the Suit of *B.* for Debt, and *B.* assumes in Consideration that *C.* an Estranger will arrest *A.* upon a *Cap' Utlagat'*, that he will pay him 40 s. This is no good Consideration, altho' he shews in his Declaration that he was after made a Special Bailiff to the Sheriff, to arrest him by a Warrant directed to him. This is Extortion, and the Sheriff by such Means may extort great Sums for doing his Office: And the Bailiff is the Officer of the Sheriff and his Servant. 1 *Rol. Abr. ib, Faldoe and Salter. Jones 65. Mesme Case. Latch 54. Mesme Case.* But if a Promise be made to a meer Stranger to go to the Sheriff, and procure him to arrest *S. J.* this is a good Consideration; so if one pray me to go with the Sheriff to assist him in making Execution, and promiseth me, &c. it is good.

See now the several Statutes touching Sheriffs Fees. 3 *Geo. cap. 15 & 16.* In my *Treatise of Replevins, pag. 73, 120, &c.*

C H A P. XXXII.

Bonds or Covenants between the High-Sheriff and Under-Sheriff, or other Officers. What shall be good in Law, or not: And when said to be forfeited, or not.

Bonds, Covenants, &c.

IF the Under-Sheriff covenant with his High-Sheriff, to save him harmless from all Fines and Amerciements for any Escape; and covenants also, That he will not execute any Writ of *Execution* above the Sum of 20 *l.* without Warrant from the High-Sheriff: This last Covenant is against Law, and void; yet the other is good, (but a Bond in such Case is void in all). For by the Statute of 27 *Eliz. cap. 12.* the Under-Sheriff takes Oath to execute all Process. *Hob. 15. Norton and Sims. 2 Roll. Abr. 30. Mesme Case.*

Vide supra Tit. Under-Sheriff.

The Keeper of *Ludgate* gives Bond to the Sheriff of *London*, That he should safely keep the Prisoners committed to his Charge, and should save the Sheriff harmless from all Escapes. The Bond is good. (*Quære* as to the last Part.) *Cro. El. 466. Hector and Gennet.*

But it is not forfeited by Escape of one taken by a *Capias Utlagat* in Debt; because the *Capias Utlagatum* was awarded the 25th of *Eliz.* and was returnable the 35th of *Eliz.* and so meerly void. For every *Capias* ought to be returnable the ensu- ing Term; because of the Mischief that otherwise might befall the Prisoner to be kept always in Prison, and he might well let him at large. 21 *H. 7.* 16. 8 *Ed. 44. Dyer 175.*

I i 4

Though

No law-
ful Imprisonment.

Though peradventure this Arrest, by Force of this Process, is excusable in False Imprisonment by the Sheriff, yet clearly it is no lawful Imprisonment; and as to the Prejudice or Benefit of a Stranger, he shall never be said to be a Prisoner. 14 H. 8. 16. 11 H. 4. 36.

Upon Covenant that Defendant should not let at large any Prisoner arrested in Debt.

Debt on Bond to perform Covenants; which was, That the Defendant should not let at large any Prisoner arrested, without the Sheriff's Warrant. The Plaintiff shews, The Defendant had let such a Prisoner at large at *Westminster*, &c. it is good without shewing the Time and Place of the Arrest. For the Escape is the material Part of the Covenant, and the Manner of the Arrest is not in Question, and whether he were legally taken or imprisoned, was not material, when he was suffered to go at large. *Siderfin pag. 30. Jenkin's Case.*

For a Bailiff of an Hundred to make true Return of all his Writs.

The Condition of the Bond was: Whereas S. was Sheriff of *Surrey*, and made T. Bailiff of the Hundred of B. Now if he should execute his Office, &c. and make true return of all Writs directed to him, then, &c. Defendant pleads on Oyer particularly, Performance to all. Plaintiff replies, Process was directed to him to levy Issues on J. S. and that he made his Warrant to T. to execute the same, which Warrant he did not return.

On Demurrer, Judgment and Defendant.

On Demurrer, Judgment was against the Plaintiff; because he did not shew that the Issues were to be levied in the Hundred of B. For though the Words are general, to make Return of all Warrants directed to him, yet it was to be understood of such only as were to be executed in his own Hundred, of which he was Bailiff. *Allen pag. 10. Slaughter and Day. 2 Sand. 414, 415. Mesme Case, cited there.*

Debt

Debt on a Bond by Under-Sheriff, to defray the Expence of the High-Sheriff; and Performance pleaded. Plaintiff replies, *J. S.* recovered in Charges in carrying the Prisoner from *Chelmsford* to *London*, not shewing it was done by Virtue of *Habeas Corpus*. Defendant rejoins, This was by private Agreement. Plaintiff demurs, because it was not concluded to the Country. *Per Cur'*, There must be a Compulsion shewed by *Habeas Corpus* to the Sheriff of *Essex*, without which he cannot deliver him over to another Sheriff; and then there is an Allowance upon the Account in the *Exchequer*, in Case of Transporting, being signed by the Judges. And the Court gave Leave to discontinue. 3 *Keb.* 448. *Lewen* and *Allcock*.

As to the Form of the Indentures and Covenants between the High-Sheriff and Under-Sheriff, *vide Dalton, Greenwood of Courts*, and several other precedent Books.

The Form of an Indenture between the High-Sheriff and his Under-Sheriff. *Dalt.* 445, &c. *Aliter* 451.

Another for the same Purpose. *Ibid.* 447. &c.

A Condition to perform Covenants. *Id.* 450.

A Condition to pass an Account, and to procure a Discharge for a Sheriff. *Ibid.*

A Condition from a Bailiff to a Sheriff. *Ibid.*

Another Condition to exercise a Bailiwick. *Ibid.* 452.

A Condition of a Gaoler for the safe Keeping of his Prisoners. *Ibid.*

The

The Form of a Bond for Appearance.

NOverint universi per presentes Nos A. B. de C. in Com' Warw' Gen' E. F. de L. &c. & H. T. de, &c. teneri & firmit' obligari A. B. Mil' Vic' Com' pradiet' in quadragint' libris bonæ & legalis Monetæ, &c. solvend' eidem Vicecomiti aut suo certo Attornat', &c. (as in other double Bonds.)

Conditio istius Obligationis talis est, Quod si supra Obligatus A. B. compareat personalit' coram Dom' Reg. (or, coram Justiciar' Dom' Regis) apud Westm' (a die Paschæ in quindecim dies) ad respond' K. W. de placito debiti (transgress. ac etiam billæ, &c. detentionis, &c.) [as in the Writ] quod tunc præsens Obligatio vacua & pro nulla habeatur, alioquin in suo robore permanere & vigore.

A Condition to pass an Account, to procure a Discharge for a Sheriff.

THE Condition of, &c. That if the above-bounden T. F. his Heirs, Executors and Administrators, do make a true and perfect Account of and for the above-named T. T. his Heirs and Executors, in the Exchequer of our Sovereign Lord the King, of, for and upon all Issues, Charges, Sum and Sums, which be or shall be charged or demanded of or upon the said T. as late Sheriff of the said County; and do get and procure a sufficient *Quietus est* thereof for the said T. T. his Heirs and Executors. And more-over, do well and truly discharge,

discharge, save and keep harmless the said T. T. his Heirs, &c. against our said Sovereign Lord the King, his Heirs and Successors, and all other Person and Persons, of, for and concerning the said Office of Sheriff, and all the Receipts and Charges thereof: That then, &c.

A Condition for a Bailiff of an Hundred to enter into, to the Sheriff. *Vide* Precedents in *Dalt.* cap. 115.

A Condition for a Gaoler to enter into, for the safe Keeping of his Prisoners. *Vide Dalt. ibid.*

CHAP.

C H A P. XXXIII.

Of Sheriffs Accounts.

AS for the Periods of Time, wherein the Manner of the Sheriffs Accounting to the King have been altered by Acts of Parliament and Practice, you may peruse a learned Treatise of the late Lord Chief Justice *Hale* touching Sheriffs Accounts. You find there how the King's Farms were anciently answered by the Sheriffs, and the Manner of the Collecting of the King's Revenues of the County.

Firmi Comitatus. Now that which was *Firmi Comitatus*, were the *Vicountiel Rents*, and they came under various Denominations, (*viz.*) *Blanch-Rents*, *Albo firma*, *Præstatio pro pulchre placitando*, *Visus Frankpledg*, *Redditus ad Turnum*, *Certum Letæ*; and these were in Time contracted to a Sort of Annual Revenues.

Proficuum Comitatus. And the uncertain Annual Revenue was called *Proficuum Comitatus*, which in ancient Times was considerable, when most Law-Suits were transacted in Counties, and in Hundred-Courts, Fines, Issues and Amerciaments in those Courts; and in those elder Times they were considerable.

May not let Bailiwick to Farm. The Farm of the Bailiwick of one County was let at 100 *l. per Annum*, *temp. H. 3.* but by Statute 27 *H. 6. cap. 10.* the Sheriff is restrained from letting his Bailiwick to Farm.

Proferæ Vicecomitis. But these were formerly, and now are answered at two Terms in the Year, *Michaelmas* and *Easter*, and are called *Proferæ Vicecomitis*, or Sheriffs Proffers. But it is as it were a Mock-payment (now being so inconsiderable, most Causes being tried in superior Courts); for upon

Account

Account he generally has all his Proffers paid and allowed to him again. *Vide Stat. de Scaccario* made 51 H. 3. and *vide* the Statute of 4 H. 5. 2. and 34 H. 8. c. 16. *Dalt.* 474.

It now seems, that as well High-Sheriffs as Under-Sheriffs (of most Shires) in *Hillary-Term* next Time to after they are out of Office, are sworn to yield up, Account and give a just and true Account to the Queen, and the Officers of the *Exchequer*, of all such Duties, &c. as are due and belong to the Queen, and chargeable upon them to answer for by reason of his Office. *Dalt* 475.

See there also the Form of the Oath of a Sheriff for passing of his Account.

Since the Statute of 34 H. 8. c. 16. the Sheriffs might discharge themselves of the casual Charges, or Annual uncertain Charges, and most ordinarily after this Statute did discharge themselves of the entire *Firma de proficuis Comitatus*, and they ascertained to the Court, that there were no such Profits beyond the Charge in collecting them, or that the Charge of keeping the County-Court, the Tourn and Hundred Courts, which were the Things that made up the *Firma de proficuis* surmounted the Benefit: And this making appear, was no other than the Oath of the Sheriff, and the Statute gives him that Benefit.

Yet though the Sheriffs did use to discharge themselves by their Oaths of the entire *Firma de proficuis Comitatus*, and of a great Part of the *Vi-countiells*; yet till *Anno Dom.* 1650. these entire Farms were constantly written out in Charge to the Sheriff upon the Summons of the Pipe, though it was but a Piece of Formality.

But

But now the *Firma de proficuo Comitatus* is wholly put out of the Charge of the Summons of the Pipe, by an Order made in the *Exchequer* 1650. which is followed to this Day. Q.

For dis-
patching
their Ac-
counts.

By the Act in *Car. 2.* entituled, *An Act for the preventing the unnecessary Delays of Sheriffs in passing their Accounts*; No Sheriff shall be charged in Account to answer any illeivable Seifure, Farm, Rent or Debt, or other Thing, which was not writ in Process to him or them to be levied, where in the Persons of whom, or the Lands or Tenements out of which, together with the Cause for which the same shall be so levied, shall be plainly and particularly expressed; but shall be thereof wholly discharged, without Petition, Plea, or other Trouble or Charge whatsoever.

Of what
Things
discharg-
ed.

If the Sher-
riff, &c. is
seize, and
do not
Account.

If the Sheriff shall seise the Goods of one that is outlawed, &c. and does not Account for the same, the Owner of the Goods may have Action of *Trespass* upon such Seifure; and shall recover the Goods, or the Value thereof in Damages. For the Sheriff must plead that he has accounted for them; otherwise he shall be a *Trespassor ab initio*. And so it seems for the Queen's Rents, Debts, or other Duties, the Officers are liable both to the Queen, and to the Action of the Party, &c. *Dalt.* 481.

Sheriff
*sine Com-
puto.*

Note, The Sheriff is accountable in respect of his Office; but if he be made *sine Computo*, he has by this the Profits to his own Use. *1 Roll. Rep.* 183.

O. N. in the *Exchequer* makes the Sheriff Debtor to the King, and the Debtor himself Debtor to the Sheriff. *Hob.* 206. *Speake and Richard's Case.*

See

See the Manner of passing their Accounts in Sir *Matthew Hale's* Treatise on that Subject; *Mr. Wilkinsons* Book of the Office of a Sheriff, and *vide Dalton* of Sheriffs, Chap. 120.

And see now the late Statutes 3 Geo. c. 15 & 16. touching Sheriffs Accounts, &c. in my *Treatise of Replevins, &c.* Page 73 and 120, &c.

C H A P. XXXIV.

Of Coroners. How the Coroners must be chosen; and the Credit the Law gives to them, and how and when they shall be discharged. Their Demeanour as to Outlawries. Coroners Inquest, &c.

Of Coroners, &c. See 1 *Salk.* 152, 190, 377, &c. *Cumberb.* 386, 435.

THE Office of Coroner ever was, and yet is Eligible in full County by the Freeholders, by the King's Writ *De Coronatore Eligendo*. And so was the Sheriff in former Times Eligible, and the Sheriff was chosen by Writ directed to the Coroners.

The Coroner, because he is elected by the Freeholders of the County by Writ, and returned of Record in the Chancery, albeit the King dies, continueth in Office.

Now seeing the Coroners are elected by the County, if they be insufficient and not able to answer such Fines and other Duties, in respect of their Office, the County as their Superior shall answer for the same.

4 Rep. 41. *Heydon.*
8 Rep. 41. *Greenly's*
Case.
5 Rep. *Specot's*
Case.
4 Rep. 45. *Wrote's*
Case.
9 Rep. 31. *Strat.*
Mar.
5 Rep. *de Wreck*
108.
10 Rep. *Denband.*
St. 28 Ed.
If 3. c. 6. *E-*
lect. of Co-
roners.

Vid. 4 Inst. If a *Certiorari* be directed to the Sheriff only
271. Mag. Ch. 17 cap. W. 1. c. 10. Artic. super Chart. in Case of Appeal, or Indictment of Death, it is
 not sufficient to remove the Cause; for the Coroner is Judge of the Cause; and not the Sheriff;
 only the Sheriffs have Counter-Rolls with the Coroners.

3 *H. 7. c. 1.* gives to the Coroner a Fee of 13 s.
 4 d. upon the View of the Body, and of the Goods of the Murderers: But nothing on Misadventure. 1 *H. 8. c. 7. & W. 1. c. 10.*

King's
 Officer.

A Coroner is an Officer for the King; but he is not an Officer when he comes between the Parties; and the Court will not suffer Examination, when the Testimony may be *Vivâ voce*, 2 *Roll. Rep.* 461.

Examination.

Although the Coroner takes Examination, yet in the Case of the King it is at the Discretion of the Judges, if they will allow them, or take them *Vivâ voce*. 2 *Roll. Rep. ibid.*

Coroner
 of the
 Verge.

Before the Statute *Artic' super Cler.* 3. the Coroner of the Verge by himself might inquire of Murder: But because the King's Court often removed into another County, by reason whereof no Enquiry could be made, that Statute was made to remedy it, and One Person may be Coroner of the King's Household and Coroner of the County; and yet they are Two Coroners, &c. *Quando duo jura concurrunt, &c. 2 Leon. p. 160. Borow and Holcroft.*

Coroner's
 Oath,

When the Coroner is chosen, the High-Sheriff or Under-Sheriff of the same County, must give him his Oaths.

Supremacy, &c.

First that of Supremacy, and then that for the due Execution of his Office. *Dalt.* 443.

Four Coroners.
 Special Coroners.

There be commonly Four Coroners in every County; and there be also certain Special Coroners within divers Liberties.

There

There is also the Coroner of the King's House. Of King's House.
Vide Dalton (ut supra)

Where Process shall be awarded to the Coroners,
 or not.

When the Sheriff is Plaintiff in Action of Waste, Sheriff
 Election shall go to the Coroners *Hob. 85.* Plaintiff.
Vide Plowd. Wimbish and Willoughby. Cro. Jac.
551. and Moor. 625.

Where Writts shall be directed to the Coroners, and
 where not.

A Sheriff's Bond for Appearance is sued; the Upon a
 Writ upon it ought to be directed to the Coroner, Sheriff's
 because the Bond is to be sued in the Sheriff's Bond.
 Name. *Pract. Reg. 660.*

Upon a *Venire fac'* awarded to Coroners, and Return
 Two Coroners return this, and Two Coroners re- by Two of
 turn the *Disfringat*, where at the Time of the Re- a *Ve' fa'.*
 turn there were Four Coroners; this is not good,
 because all the Coroners ought to make the Re-
 turn, and join in it, they being Ministers and not
 Judges. *Hob. Rep. Lamb and Wiseman.*

This Case is reported by *Cro. Jac. 383.* (in the Ought so
Exchequer-Chamber.) The *Venire fac'* being a- be in all
 warded to the Coroners, was returned by *T. B.* their
 and *T. R.* Coroners; whereas at the Time of the Names,
 Writ awarded and returned there were Two other
 Coroners, (*viz.*) *W. S.* and *T. P.* and the Return
 ought to have been in the Name of the Four Co-
 roners.

Per Cur', it is no Error,

1. Because it ought to have been taken by way How not
 of Challenge at the Time of the Trial; and for- Error.

K k

asmuch Chal-
 lenge.

asmuch as he hath not challenged it, he shall not now assign it for Error.

Aided by Statute. 2. Admitting it were Error assignable at Common Law, yet (now being after Verdict) is aided by the *Statute*, which aids Mis-returns and Insufficient Returns; and this is but a Mis-return.

Names to *Venire fac'* Names were writ *A. & B. Coronatores*, and upon and not to the *Hab' corpora* the Names of *A. and B.* were *Distingas.* written, but not the Name of Coroners. *Per Cur.* It is no Error: But if their Names ought to have been here, then it is not aided *per Stat.* 32 H. 8. nor 18 Eliz. *Cro. Eliz.* 703. *Scrogg's Case.*

No Redress by Statute. Where a Jury is returned by a Coroner, where it ought to be by the Sheriff, & *è converso*, this is not redressed by the Statute *Ann.* 32 H. 8. 18 El. (*Vide* the late Stat.)

To the Coroners of Chester in Covenant. Writ of Covenant was directed to the Coroners of Chester, with a Clause at the End of the Writ, *Quia præd' J. D. miles est Vicecomes Comit. Cestria fiat Executio brevis præd' per Coronatores ita quod Vicecomes se non intromittat. Per Cur.* If the Writ be directed to the Sheriff and he is Party, it is good to avoid the Doubt to take a Writ to the Coroners: For if the Defendant appears and accepts thereof, and comes in and levies the Fine, he shall never after assign it for Error. *Cro. Car. Done and Smith.*

Where more Coroners, &c. Where and what Matters done and executed by the Coroner, where there are more shall be good, and where not. 4 Rep. 41, 45, 46, 47. 5 Rep. Long's Case. 10 Rep. 103.

Whereall ought to be Three, they ought all to execute this Warrant, execute a for the same is to be executed according to the Warrant. Direction

Direction. And by Coke the Difference is, If it be in judicial Matters, any Two of them may do it; if in ministerial, all are to do it. 3 Bulst. 77, 78. Phelps and Winchcomb. So Hob. p. 70.

The Plaintiff for the Expedition of his Trial, Plaintiff surmised that he was Servant to the Sheriff of Cornwall, where the Action was brought, and prayed a *Venire* to the Coroners. And the Defendant *non dedixit. Per Cur'*. Forasmuch as if the Sheriff had returned this Pannel, it had been a good Cause to quash the Array for Favour, that the Plaintiff to avoid that Delay might well shew it, and have Process to the Coroners; and the rather, for that this is a judicial Writ. Plow. 74. Cro. Eliz. 581. Cham. and Matthew. So in Ejectment against 4. who plead *Non cul.* if the Plaintiff suggest, That the Sheriff is of Affinity to one of the Defendants, shewing how; and upon this prays a *Venire fac'* to the Coroners, and the Defendant denies it not, and the *Venire fac'* is awarded to the Coroners; it is well awarded: For though none of the Defendants may challenge the Array, for that the Sheriff is of Affinity with one of the Defendants; yet the Plaintiff ought at the Trial either to challenge the Array, and so delay himself, or he ought not to try this, during the Time that he is Sheriff, which Where he would. If the Sheriff levy a Fine, the Writ of the Defendant must be directed to the Coroners. 1 Roll. Abr. 797. Done and Simthart. Cro. Car: 416. Mesme Case, Jones p. 343. Mesme Case, and this Clause was in the End of the Writ, *quia præd' Johannes Done miles est Vicecomes Comit. Cestria fiat Execut. brevis præd. per Coronatores ita qd' Vicecomes non se intromittat.* *Venire fac'* ought to be awarded to the Coroners. Cro. Jac. 551. Loader and Samuel.

Eject-
ment.

The Sheriff who was Lessor to the Plaintiff was Master to one of the Coroners in Ejectment; the Cause was alledged and confessed, and *Venire fac'* issued to the Coroners, *ita quod* the Servant should not intermeddle. *Moor* 625. no. 853. See after.

Venire fac' A Return of a *Ve' fac'* by three Coroners, where by Three are Four, it is Error at Common Law, but holpen by the Statute. *Hob.* p. 70.

Ita qd' the Under-Sheriff should not intermeddle. *Venire facias* was awarded to the Sheriff, which was quash'd for Favour of the Under-Sheriff, who returns the Panel, and a new *Venire fac'* awarded to the Sheriff, *ita qd'* le Under-Sheriff *ne se intromittat*. It is no Error, though it be not directed to the Coroners. 1 *Roll. Rep.* 272. *Walter's Case*.

Not till Default. *Venire fac'* not to be awarded to the Coroner, till there be a Default in the Sheriff. 1 *Roll. Rep.* 364.

Under-Sheriff. *Venire fac'* may be awarded to the Coroners, if the first be quash'd for Favour in the Under-Sheriff. 1 *Roll. Rep.* 272.

Coroner's Authority. The Authority of a Coroner, and of what Things he may enquire, &c. and the Order of such Enquiry, and of what not. 4 *Rep.* 41. *Walker's Case*, *Heydon* 45. *Vauxe's Case*, and *Wig's Case*, 5 *Rep.* 109. *Foxly's Case*.

Estrepment. The Coroner may on *Estrepment* provide against Waste by taking the *Posse Comit.* *Hob.* 85. In Waste brought by the Sheriff. *Earl of Cumberland versus Countess Dowager*.

To enquire of Death. As the Sheriff in his Turn may enquire of all Felonies by the Common Law, saving the Death of a Man; so the Coroner can enquire of no Felony, but of the Death of a Man, and that *super visum Corporis*. He shall also enquire of the

Treasure, Trove, &c. Escape of the Murderer, of *Treasure, Trove, Deodands*, and Wrecks of the Sea. He ought to deliver the Inquisition of Death taken by him at the next

next Gaol-delivery, or certify the same into B. R. He hath Power to bind over Witnesses to the next Witness. Gaol-delivery in that County : Besides the Judicial Place, he hath an Office Ministerial as a Sheriff, viz. When there is a just Exception taken to the She-Process riffs, Judicial Process shall be awarded to the Coro-Judicial. ner, to execute the King's Writs.

The Sheriff put in his Challenge to have a *Ve-Venire fac'* *nire fac'* to the Coroners, because the Sheriff was his Master, and concludes not *& issint* favourable. Yet it is good. *Moor p. 470. no. 853.*

The Parties being at Issue, a *Venire facias* was awarded to the Sheriff, and afterwards upon Entry *quod vicecomes non misit breve*, a *Venire facias* was prayed and awarded to the Sheriff, the Plaintiff had admitted him to be a Person qualified to make the Return. But *per Cur'*, Because that being awarded upon the Roll is but as a Continuance, and there was not any *Venire facias* taken forth, and it is but Matter of Form to make such a Continuance; it was held well enough. *Cro. Jac. 35. Willoughby and Egerton. Cro. El. 853.*

Upon Challenge to the Sheriff a *Venire fac'* was *Venire* to awarded to the Coroners and returned, and at the the Coro- *Nisi Prius*, a *Tales* granted to the new Sheriff, it *ners*, and is Error. *Mo. p. 356. n. 482. Morgan and Wye*, it *Tales by new She-* was held a manifest Error. *Cro. El. 894. Corn and riss.* *Passow*, and not aided by the Statute of Misconveyance of Process : For it is a Mistrial. For Process once directed to the Coroners, shall never If once to after in the same Cause be directed to the Sheriff, the Coro- though the same Sheriff which first was, be removed. *ners, so during the* *Mor. 356. n. 422.* But a *Quære* is made of this in Cause. *Hob. 64. Web's Case.*

Demeanour of Coroners as to Outlawries.

Coroners Names omitted. Outlawry was reversed, because the Names of the Coroners was not put to the Judgment. 1 Roll. Rep. 266.

In Outlawry the Judgment was, *Ideo per iudicium A. B. &c. Coronat. Utlagat' est*, and faith not *Com. præd' Coronat' Comit' præd'*, and for this the Outlawry omitted. was reversed. 2 Roll. Rep. 82.

Are Judges. Coroners are Judges in Outlawries in County-Courts. 4 Rep. 72. Mitton's Case, 9 Rep. 119. Lord Sanchar's Case.

Inquest of the next Vills. The Statute of 4 Ed. 1. *de Officio Coronatoris*, provides that such Inquest shall be *villarum proxim' adjacent. Per Cur'*; it is not requisite to shew they are the next Vills, it shall be intended if the contrary appear not. At the Common Law it is *villarum adjacent'*, and this Statute hath no negative Words, and so the Trial at Common Law remains. 2 St. derfin 144. Barclay's Case.

Where no Averment. Where a Man shall not have Averment against what the Coroner affirms upon his Examination.

Melius inquirendum, where it lies or not. The Court agreed a *melius inquirend'* after an Office *post mortem*, which is originally to the Sheriff. But after an Inquest of a Coroner *super visum Corporis*; &c. that he died of a Megrin, no *melius inquirend'* can go, the Original not being before the Sheriff, especially not until the Inquest be quash'd. And there it is but *ad informand' Conscientiam* and Traversable, as Barclay's Case, who drowned himself, and the Coroner refused to hear the King's Witness; and thus in Case of Miscarriage, and quashing the former Inquest, they will grant a new one. 1 Keb. 859. The King against Stanlack. Vide post. 504.

Coroner's Inquest.

A Flight found by the Coroner's Inquest is final Flight as to the Forfeiture of Goods, and cannot be tried found again. *Hob. p. 318.*

If one is killed in a Village, and the Coroners Village a- make no Inquest, the Village must be amerced. merced. *1 Keb. 278.* Lord *Buckhurst*, and if there were an Inquest, it must be returned *per Certiorari*; the Coroner is to return his Inquisition at the next Coroner Gaol-delivery; and because he did not, the Court fined. discharged him, and set 100 *l.* Fine upon his Head, they having found it Murder, 280. *Vide 2 Hawk. pag. 49.*

The Coroner ought to sit upon the Body of Must sit every Prisoner that dies in Prison, 3 *Inst. 523* 91. upon Pri- He may cause the Body to be dug up soon after its soner dy- Burial, but not a long Time after, 1 *Salk. 377.* and ing. if the Inquest be quashed, he must make a new one, *super visum Corporis.* 1 *Salk. 190.* 2 *Hawk. pag. 48.*

Where the Body of a *Felo de se* cannot be found, *Felo de se, & trait devant les Coroners*, his Goods shall be forfeit and found before the Justices of Peace. 1 *Roll. Rep. 272.*

Melius Inquirend' upon the Death of a Man di- *Melius in-* rected to the Coroner, and not to the Sheriff, be- quirendum. cause none but Coroners can enquire *super visum Corporis.* But for the Misdemeanour of the Coroner, it may be quash'd, and a new one granted; the Coroner must take the Evidence in Writing, and must bring his Examination into Court upon Occasion. *Mod. Rep. p. 82. Cumberba. 386. 1 Salk. 190.*

Process may be awarded against a Coroner, to Coroner come in to mend the Inquisition, or he may be served to mend with a Rule to attend to amend Matters of Form, an Inqui- sition. but

but not Matters of Substance, as the Inquest found *G. Felonice seipsum submers. fuit*, but saith not he cast himself into the Water. But *Felonice submersus* is the Substance. *Siderfin* p. 209. the King and Glover, 225. vers. King and Harrison.

Legal. homin. Paroch.

Inquisition before a Coroner without saying *Legal. homin. Villar. prox. adjacent.* but *Legal. homin' Paroch. de A.* yet good.

Melius inquirendum to the Sheriff.

Commission to the Sheriff (in the Nature of a *Melius Inquirendum*) to enquire of the Death of a Man when it had been found before the Coroner before, is against the Statute of 28 Ed. 4. 9. But there are divers Precedents since that Statute of such Commissions awarded. And see 1 Salk. 190. That on a *Male se gessit* by the Coroner, the Inquiry must be before the Sheriff or Commissioners.

Simile after Coroners Inquisition returned.

The Court was moved for a *Melius Inquirendum* to be directed to the Coroner of N. to enquire what Goods *T. Felo de se* died possessed of, because the Inquisition returned did only find the Goods he was possessed of in London. *Per Glyn*, take it, but it must be directed to the Sheriff, because the Coroner has done his Office already. *Stile* 461. *Blackwell's Case*, and so was *Toome's Case*.

Death occasioned by a Nuisance.

The Coroner may find such a Nuisance as occasions the Death of a Man, *Allen* p. 51. and the Township shall be amerced thereupon, as a Breach in a Bridge whereby a Man falls into a River and was drowned.

See *Smith's Case*, *Cumberba*. 386. the Coroners Inquest find a Post to be the only Cause of Death, though a Coach and Horses struck the Post which killed the Man.

The Coroners Inquest was quashed, because the Wound was not set forth, nor that the Party died of it. *Salk*. 377.

Yet he must accept such Presentment as the Jury makes. *Cumberb*. 386.

Where

Where the *Venire* must issue to the Coroners, or not. 1 *Salk.* 152.

How the Coroner is to be chosen, and how to make his Inquisition. See 3 *Salk.* 100.

How a Coroner shall be discharged of his Office, Coroner and what shall be a sufficient Cause to discharge him, or not. *Vide* 5 *Rep.* 57. *Specor's Case.* discharged his Office. 8 *Rep.* 41. *Greisly's Case,* 9 *Rep.* Sir George Reynell's Case.

The Mayor is Coroner in the City of London Mayor of and Southwark. 4 *Inst.* 250. See *Privilegia Londini,* London. 20, 23, 49, 67, 68.

But he doth not pronounce Judgment upon Outlawry; but the Recorder. 8 *Rep.* City of London.

The Authority and Credit the Law gives to Credit the Rolls and Records of the Coroner, *vide* given to Coroners Records, *supra.*

For Judicial and Ministerial Authority of Sheriffs and Coroners, *vide* Greenwood of Country Judicatures.

Also *vide* Wilkinson's Office and Authority of Coroners and Sheriffs.

See further of Coroners, 1 *Hawk.* ch. 26. sect. 8. ch. 27. sect. 11, 13. and ch. 68. sect. 3. 2 *Hawkins,* ch. 8. sect. 5. and ch. 9. *per totum.*

THE TABLE.

A.

A <i>Ceedas ad Curiam</i> , the Nature of it, and Returns	Page 80
Accounts of the Sheriff	16, 490, &c.
Acres, where to be estimated according to the Custom of the Country	264
Actions for disturbing Proceſs of the Law	105
Actions upon the <i>Caſe</i> for and againſt Sheriffs and their Officers, for Escapes, Rescues, &c.	346, 417, 420, 423, 424, &c.
References to Precedents of Actions for and againſt Sheriffs and their Officers &c.	436, 437, &c.
Amendment of Returns	161, &c.
Amercement: Where and in what Caſes the Sheriff ſhall be amerced	131, 133, 414, &c.
Of Appearance on Bail-Bond	99, 100, 113, &c.
What Appearance to Sheriff's Bond good	117, 129, &c.
Appearance of the Party cures the Return of one that was not Sheriff	153
Arreſt: What Arreſt is good or not, as to the Manner of doing it	91, &c.
What is good in reſpect of the Manner of the Arreſt	Ibid.
In reſpect of the Time	92
In reſpect of the Warrant. (<i>Vide Warrant</i>)	100, &c.
	In

The TABLE.

In respect of the Persons arrested, and who are Privileged, or not	Page 94, 95
With an Abstract of the late Acts concerning Ambassadors and their Servants	98
And for preventing frivolous and vexatious Arrests	99
Arrest after a <i>Supersedeas</i>	419
Attachment : The Nature of it	413
Against the Sheriff, in what Cases	Ibid.
Against others	414
On Attachment the Sheriff ought to return the Certainty of the Goods, and why	Ibid.
On Attachment of Money in the Sheriff's Hand	415
<i>Affize</i> : Return of the Writ	463, 475
<i>Assumpsit</i> , and Consideration about paying Fees, what shall be good or not.	166, 484
Promise to procure Goods, to be found by Inquisition	281
One Part of a Promise unlawful makes all vicious	283
In Consideration of making one Special Bailiff, a Promise to save harmless from Escapes	54
In Consideration he would prosecute a new <i>Elegit</i> , &c.	282
Considerations on <i>Assumpsit</i> about Delivery of Prisoners in safe Custody, and saving harmless of Escapes	390
<i>Assumpsit</i> for paying the Sheriff's Fee, what good or not	484
Sheriffs Duty as to the <i>Affizes</i> and <i>Sessions</i>	474
<i>Audita Querela</i> : Writ of <i>Audita Querela</i> , as to the Form	271, &c.
Where <i>Audita Querela</i> lies on Escape out of Execution, or not	Ibid.
Outlawry pleaded to <i>Audita Querela</i>	272
Where it lies on Escape, as to Mean Process	375
Delivery upon a void <i>Audita Querela</i> , whether it be an Escape or not	335, 344
	Averment

The TABLE.

Averment against the Sheriff's Return, where good
or not

Page 177, 178

B.

Bail : The Custom of the Court as to putting in Bail	108, 109
Bailing is the Act of the Court, and the Consequence	<i>Ibid.</i> and 389
One in Execution in the Custody of the Marshal, not compellable to find Bail, if another Action be brought against him. <i>Aliter</i> as to the Fleet	108, 109
Who to take Bail in London	<i>Ibid.</i>
Bail for one taken by Cap' <i>Excommunicat'</i>	110
Scire fac' on the Escape of the Bail. <i>Vid.</i> Escape.	
Scire fac' and Return of it against the Bail	110
Bail <i>de bene esse</i> , what	111
The Statute of 23 H. 6. c. 10. of Bail-Bonds explained	112
The Form therein to be observed	<i>Ibid.</i>
What Bond good within the Statute or not	115, 116, &c.
Pleadings upon that Statute	124, &c.
The Advantage of Pleading this Statute lost by Demurrer	132
Of Sheriffs Returns on Bail-Bonds	131
Of Sureties on Bail-Bonds	122
Of Bail-Bonds being discharged or assigned	134, 135
The Sheriff not to take above 40 l. Bail, how understood	142
In what Cases the Sheriff may bail or not	143
Actions on the Case against the Sheriff, for holding to extraordinary Bail	142
Bailiffs of Hundreds, &c. their Nature Office	50, 51
Of Common and Special Bailiffs	54, 55
	Not

The TABLE.

Not to be prejudiced by the Non-Return of the Sheriff	Page 54
To take the Oath of Allegiance	<i>Ibid.</i>
Special Bailiff: What and how they stand in the Eye of the Law	<i>Ibid.</i>
Bailiff of Franchises	55
What Bonds for Appearance they may take	<i>Ibid.</i>
To what their Office extends not	<i>Ibid. &c.</i>
Of their Returns to the Sheriff	<i>Ibid.</i> and 60
Where and in what Cases the Sheriff may enter their Franchise	61
Bailiff of a Franchise not to take Benefit of his own Liberty	60
Pleadings by Bailiffs of Franchises	61
Bailiffs of Fee or Guildable. <i>Vide</i> Return	62, 63
Baron and Feme: How the Husband is to be charged on the Conversion of his Wife, upon a Special Verdict	218, 407
Debt lies on Escape of the Wife	335
Bonds, Bail-Bonds. <i>Vide supra</i>	56, 112
Other Bonds and Covenants entred in to the Sheriffs, what shall be good or not	135, &c.
Bond to be a true Prisoner, and the Pleading	136
For Chamber-Rent	140, &c.
Bonds or Covenants between the High Sheriff and his Officers, p. 36. Ch. 32.	486, &c.

C.

<i>Capias ad Satisfaciend'</i> , what	238
Against whom, and for what it lies	<i>Ibid.</i>
Of the Sheriffs Demeanour therein	<i>Ibid.</i>
Of the Returns upon it	239
<i>Ca. fa.</i> after a <i>Fieri fac'</i>	<i>Ibid.</i>
Of Escape of one in Execution by <i>Ca. fa.</i> <i>Vide tit.</i>	
Escape	335, 356, 357, &c.

The TABLE.

Cap. ad Sat. against the King's Debtor in Execution	Page 239
Return on <i>Fieri fac'</i> , <i>Quod Clericus est beneficiatus</i>	253
Where a <i>Ca. sa.</i> shall be after an <i>Elegit</i>	280
Of the Return of <i>Clericus Beneficiat</i>	253
Of Challenges, <i>vide infra.</i>	
Courts, as to them	121
Courts: Diversity where a Court has Jurisdiction of the Cause, and where not	397
Cause of Action must be alledged to arise in an inferior Jurisdiction	<i>Ibid.</i>
Where and how the Jurisdiction ought to be set forth, or not	261, 398, 409, &c.
Where one is arrested in an Inferior Court, when Cause of Action does not arise there, Action lies against him that levied the Plaint, and not against the Officer	408
Justification by Process out of an Inferior Court of Record, how to be Pleaded	409
Returns from Inferior Courts. <i>Vide Return</i>	
County: When the Kingdom divided into Counties	2
Counties in <i>England</i> and <i>Wales</i>	19, 20
<i>Notatio Nominis.</i> Viscounts of two Sorts, and the Original	2, 3, &c.
County-Court incident to the Office of Sheriff, the Stile of it, who are Judges	63, 64
Jurisdiction of it	65
As to the Sums it holds Plea of	<i>Ibid.</i>
As to the Time	66
As to the Place	<i>Ibid.</i>
The Process in the County-Court	68
Of the County-Clerk	70
<i>Colore Officii</i> how to be taken	123
Challenge. The several Sorts	209, &c.
What a good Cause of Challenge, or not	210, &c.
Difference between a Covenant and a Bond	135, 480, 486
Covenants entred in to the Sheriff	Chap. 32.
	Of

The TABLE.

Of Coroners : How chosen, and their Demeanour, Duty and Office	Ch. 34. per tot.
Action on the Case : Against the Sheriff on E- scapes	Ch. 21. Page 325, &c.
Against the Sheriff for holding to unreasonable Bail	421, 422, 424, &c.
For imbeziling an <i>Exigent</i>	417, 419
For entering into a Franchise or Corporation which had <i>Retorna Brevium</i>	419
For not delivering a <i>Supersedeas</i> to the new She- riff	<i>Ibid.</i>
Against an Under-Sheriff, for concealing a Writ	420
Against the Sheriff's Deputy for substracting a Writ	<i>Ibid.</i>
For refusing sufficient Bail	421
For not bringing Money into Court levied by <i>Fieri fac.</i>	422
<i>Pro vicount</i> if the Conusee sue an Extent, and re- fuse a <i>Liberate</i> , to the Intent to defraud him of his Fees	481
<i>Vide Return. Vide Rescous.</i>	

D.

The Form and Manner of the Sheriff's Discharge	16, 17, 23, &c.
Delivery of Prisoners, and of the Old and New Sheriff	23, 24, &c.
Delivery of Prisoners, and Writs by the Old Sheriff to the New, and how to be made	<i>Ibid.</i> and 29, 326
Till what Time the old Sheriff or his Officers may act	23
The Form of the Indenture for setting over Pri- soners	27
What Acts may or must the old Sheriff do after he is discharged	28
What	

The T A B L E.

What Remedy against him after discharge for a Misdemeanour in his Office	Page 29
Of the Sale of Goods on <i>Fieri fac'</i> after the old Sheriff's Discharge	Ibid.
The Form of Pleading, the Removal of one Sheriff, and the Election of another	30
Sheriffs Deputy	30, 31, 37
Pleading by him	37
Of Rescue from him	38
<i>Distringas Juratores</i>	202, 205
Declaration in Action on the Case for the She- riffs fraudulent Omission of Exesution of Goods	248
The Course of declaring in B. C.	365
Declaration on Escape on <i>Cap' Ul'</i>	348, 367, 368
Declaration in Action on Escape. <i>Vide</i> Escape	363, &c.
Where and in what Cases the Sheriffs Return of a <i>Devastavit</i> shall be good, and the late Practice in Cases of <i>Devastavits</i>	215
The Party may discharge himself of a <i>Devastavit</i> by Plea, That the Sheriff levied the Money by <i>Fieri fac'</i>	218
Sheriffs Demeanour in a Writ of Dower	444, &c.

E.

<i>Elegit</i> : The Nature of it as to Land and Goods	274, &c.
What Things may be extended or not	275
Inquisition on <i>Elegit</i> , when void or not	276
Where a new <i>Elegit</i> , or Re-extent, may be or not	276, 280, 281
Of <i>Capias ad Sat.</i> after an <i>Elegit</i>	279
The Sheriff not to deliver a Lease at another Value than the Jury find it	277
The Sheriff to set out the Moieties distinctly	Ibid.
	On

The TABLE.

On a second <i>Elegit</i> , the Sheriff can only deliver a Moiety of a Moiety	Page 278
The Sheriff to deliver the Moieties, and not the Jury	281
There must be an Inquisition, and the Sheriff himself cannot extend it	283
Actual Possession not to be delivered on <i>Elegit</i> , only to enable one to bring <i>Eject' Firma</i>	279
The Returns on <i>Elegit</i> , what are good or not	286
The Entry of the Return of <i>Elegit</i> on the Roll	<i>Ibid.</i>
Extent by the Bailiff of a Liberty and Inquisition by him	281
Of <i>Elegits</i> and <i>Testatums</i> into London, Lancashire, and other Counties	295, 296
Extent of a Term. <i>Vide Fieri fac'.</i>	
Serjeant at Mace may execute an <i>Elegit</i>	235
Entry, Return of the Writ	462
Escape: Not to be judged strictly	9
Diversities of Escapes	324, 325, 353
Observations concerning Sheriffs dying, and Escapes before another is made	326, 327
Of Escapes voluntary and involuntary	328
Of Escapes as to Mean Process	329
What shall be said an Escape of a Prisoner out of Execution in Debt; or not	330
On the Sheriff's removing the Prisoner, what Favour shall amount to an Escape or not	<i>Ibid.</i>
	331, &c.
Debt lies on the Escape of a Wife	335
Of Escapes in respect of the <i>Committitur</i> entred	336, &c.
<i>Scire fac'</i> on the Escape of Bail	337
Execution served upon one that is Prisoner for Felony, and then escapes	335, 393
Of Escapes as to old and new Sheriffs	326, 337, &c.
What Thing or Act shall excuse the Sheriff from an Escape	340
L 1	Escape

The T A B L E.

Escape on Cap' Utlagar', and the Declaration	Page 367, 368, &c.
How far erroneous Process shall excuse an Escape in the Sheriff, or no,	340
Where the Escape of one shall be the Discharge of another, or not	344
Escape of one in joint Execution	345
Variance between the <i>Teste</i> of the Writ, and Finding by the Jury an Escape	342
Laying Action and Declaration in Escapes	352, 361
	362
Declaration as to the Delivery of the old Sheriff in Escape	370
Declaration on Escape in inferior Courts	341, 368,
	369
Where the Sheriff shall have an Action against the Prisoner that escaped, and how to declare against him	371
Escape brought after the Plaintiff in the first Action acknowledged Satisfaction	379
Information against the Sheriff for an Escape	377
Pleadings on Escape: Fresh Pursuit	374, 377, &c.
<i>Permissit ire ad Largum</i>	358
<i>Non permissit ire ad Largum</i>	374
Acknowledgment of Satisfaction pleaded	379
Stat. Limitations pleaded	<i>Ibid.</i>
<i>Supersedeas</i> , Protection pleaded	383
<i>Nul tiel</i> Record	380
Of Escape being pleaded in Bar	385
Escape by Permission no Plea	<i>Ibid.</i>
By Consent of the Plaintiff a good Plea	380
Bar by voluntary Escape, ill as to the Party-Plaintiff	357, 385
Discharge by the Gaoler is not a good Discharge, tho' formerly adjudged otherwise	386
Issue, Evidence, Verdict in Escape, what good, or not	<i>Ibid.</i> & 390
Escape brought against Baron and Feme	391
	<i>Venue</i>

The TABLE.

Venue in Escape	Page 384
Debt or Case against the Sheriff for Escape out of Execution	330
For Escapes on Mean Process	329
Who shall have Action of Debt on Escape, and to whom it shall be said an Escape at Election	328, 349, 353
Executor shall have Action on the Case against the Sheriff for Escape out of Execution, or Mean Process, and how to be brought	330, 352, 359, &c.
Action on the Case, if it lies against the Under-Sheriff for Escape	355
Where against the Bailiff of a Franchise	356
Not against the Sheriff or Gaoler's Executors <i>Q. Ib.</i>	
Against a Serjeant in London on Mean Process	357
Where Escape shall not be a Discharge of Execution, but that he may be retaken again, or not	<i>Ibid.</i>
If one be in Prison and the Marshal die, and the Prisoner escape, what Remedy	357, 358
If the Prisoner rescue himself, the Party may sue the Sheriff, or begin <i>de novo</i> upon the Judgment	359
Of Escape of Felons	393
<i>Estrepment</i> , concerning it	458
<i>Excommunicato capiendo</i>	459
Execution: Where one shall be said to be in Execution, or not, without Prayer of the Party	328, 329, 349, 350
Where the Court may commit in Execution, tho' the Record be removed	230
How and in what Cases the Sheriff may break open an House to do Execution	<i>Ibid.</i> &c.
To what Sheriff, of what Place or County shall Execution be awarded	235
Execution by the Sheriff after a <i>Superfeded</i>	269, 270
Of <i>Extents</i> : Vide <i>Fieri facias</i> , &c.	281
Return of a Writ of <i>Elegit</i>	280
L 1 2	Return

The TABLE.

Return of a Writ of Entry

Page 462

F.

Prisoners not to be delivered till their Fees paid	226
What Fees the Sheriff is to take, <i>Ch. 31</i>	477
Sheriff's Fees, by whom to be paid	478
Poundage allowed the Sheriff out of a Fine on Conviction on Indictment of Barretry, levied as a <i>Fieri fac'</i> , and how and by whom allowed	479
What Security the Sheriff may take for Fees, or not	<i>Ibid.</i>
What Remedy shall the Sheriff have for his Fees	480
Where and in what Action the Sheriff shall not take Fees	481
What shall be said Extortions in Sheriffs and Gaol- ers, and how punishable	<i>Ibid.</i>
Consideration in <i>Assumpsit</i> for paying Fees	484
<i>Fieri fac'</i> , what	242
Whether a <i>Fieri fac'</i> on a Judgment in the King's Bench, shall go into <i>Wales</i>	260, 261
Property in the Sheriff upon Seizure of Goods	174, 244
Property of the Goods not in the Plaintiff before <i>Liberate</i>	285
What Goods, and of whom shall be taken in Exe- cution by <i>Fieri fac'</i>	243, &c.
What Action the Sheriff shall have for the tortious Taking away of Goods after he has seized them	244
Where and what Remedy against the Sheriff for the Money to the Value of the Goods taken in Execution	246, &c.
The Sheriff cannot deliver Goods in Satisfaction of the Debt	248
Sheriff sells the Goods of <i>J. S.</i> a Stranger, on a <i>Fieri fac'</i>	<i>Ibid.</i>
What	

The TABLE.

What is the Sheriffs best Way to save themselves from seising and selling the Goods of a Stranger in Execution	Page 248
Where the Plaintiff shall have a new <i>Fieri fac'</i> , or not	249
Of the Sheriff's Selling Goods on the <i>Fieri fac'</i> , and of the <i>Venditioni exponas</i>	250
What shall be a good Return of the Sheriff on a <i>Fieri fac'</i> , or not	252
The Form of the Return of a <i>Fieri fac'</i>	254
Where it shall be in the Election of the Sheriff on a <i>Fieri fac'</i> to sell a Term, or deliver it in Extent	255, 258
Difference between the Extent of a Term on <i>Ele-</i> <i>git</i> , and a Sale by <i>Fieri fac'</i>	258
What is the safest Way for the Sheriff to sell a Term	<i>Ibid.</i>
What Term is not extendible	259
Force: The Sheriff's Office about removing it, &c.	5, 6, 451, 475
Fraud not to be intended, except it be expressly found	260
Fresh Pursuit: What shall be a sufficient fresh Pursuit, and where upon fresh Pursuit he may be re-taken	328, 374, 375
Gaoler makes fresh Pursuit, and before he is taken the Prisoner dies, yet Action lies against the Gaoler	376
Fresh Pursuit pleaded, and how	377
What is good Evidence of fresh Pursuit, or not	386, 387, &c.
Franchise: <i>Vide</i> Bailiff. <i>Vide</i> Return.	
Action on the Case lies against a Sheriff for entering a Franchise, or Corporation, which had <i>Retorna Brevium</i>	419, 437

The TABLE.

G.

Gaols, Prisons: To whom they belong	Page 221
The Place where to be kept	<i>ibid.</i>
Sheriffs of London's Prison	220
The Sheriffs Demeanour towards Prisoners	224
Payment of a Debt of one in Execution to a Gaol- er, if good	226, 240
Prisoner not to be delivered till he pay his due Fees	226

H.

<i>Habeas Corpus Jurat</i>	186, 187
<i>Habeas Corpus</i> , the several Sorts, and their Returns	195, 196, &c.
Who to pay the Charge of <i>Habeas Corpus</i>	199
Forms of the Returns of <i>Habeas Corpus</i>	200
<i>Habere fac' Possession'</i> . <i>Vide Possession.</i>	

I.

<i>Justicies</i> ; the Nature of it, and the Return	65, 69, 81, 82
Jurors of two Sorts	200
Returns of Jurors	201
Who are exempt from Juries	202
And how they shall be discharged	<i>ibid.</i>
Their Remedy for being Impanelled	<i>Ibid.</i> & 203
Of levying Issues, and when	206, 207
<i>Supersedeas</i> restrains a Sheriff from returning a Jury	208
What Estate Jurors must have	207, 209
<i>Jeofails</i>	165

Where

The TABLE.

Where Trespass and false Imprisonment lies against the Sheriff, or what Acts of the Sheriffs, Bailiffs, &c. shall amount to a false Imprisonment
Chap. 24. Page 394, &c.

Inquisition on *Elegit*, *vide Elegit*
 Information against the Sheriff for Escape 377

K.

The Sheriffs Office about Execution for the King's Debt 286
 The King cannot Licence a Prisoner to go at Large 333

L.

Latitat; the Nature of it 109, 400, 404.
 Statute of *Limitations* pleaded in Escape 380
 —Pleaded to *Action on the Case*, for not bringing Money into Court levied by *Fi. fac.* 422
London: Custom as to Officers, Courts, *Chap. 29.*
p. 469
 Sheriffs of *London*, their Courts, their Prison 270
 How to lay the Custom of the Sheriffs Court in Pleading *Ibid.*
 Difference of the Entries in the *Mayor's Court* and *Sheriff's Court.* 471
 Of entering Actions in the *Counter* 470
Liberate: Property of the Goods not in the Plaintiff before *Liberate* 287

N.

Non obstante: Dispensation 14
 Notice of *Executions* to the new Sheriff 25

The TABLE.

O.

The Form of the Sheriffs Oath	Page 18, 19
Before whom, and how to be taken	<i>ibid.</i>
Under-Sheriff and Bailiffs Oath.	34
One may be Officer and Judge <i>diversis respectibus</i>	35
Outlawries, concerning them	299
Outlawry pleaded in Bar to <i>Audita Querela</i>	273

P.

Parliament: The <i>Sheriffs</i> Office as to Electing Knights and Burgeses of Parliament	464
The Form of the Indentures for Knights and Burgeses	466, 468
The Form of the Sheriffs Return of the Writ for electing Parliament-Men	469
Partition: The Sheriffs Demeanour in a Writ of <i>Partition</i>	450
<i>Pleadings</i> : Pleading to <i>Audita Querela</i>	272
Pleading on the Stat. 23 H. 6. c. 10. by the Prisoner, or by the Sheriff	124, &c.
Pleadings by Bailiffs of Franchises	61
Justification by Process out of an Inferior Court of Record, how to be pleaded, <i>vide supra</i>	398
The Form of Pleading the Removing of one Sheriff, and the Election of another	60
Pleading by the Sheriffs Deputy	37
Pleading of the Statute of <i>Limitations</i> in Escape	379
Pleading by the Sheriffs, Bailiffs, Gaolers, and how Justification must be in Action of <i>Trespass</i> or <i>False Imprisonment</i> , by Process, Warrant, &c. and how to be pleaded as to the Time of taking out the Writ, Place, Traverse, Chap. 24, &c.	394, 395, &c.
	Justifi-

The TABLE.

Justification by Execution, how to be pleaded	Page 405
Pleading in <i>Trover</i> on <i>Fi. Fac.</i> and how	<i>ibid.</i>
Pleading to <i>Trespass</i> , by taking Goods by Recovery	399
Pleadings in Escape, <i>vide Escape</i>	
Pleading the Jurisdiction of the Court, and how,	61, 341, 409
Pleadings in Replevin (<i>vide Replevin</i>)	71, &c.
Pledges, <i>vide Replevin</i>	72, 104, &c.
<i>Posse Comitatus Sparsum</i>	10, 160, &c.
Possession: In <i>Habere fac' Possession'</i> the Sheriff is to make Execution of the right Thing at his Peril	263
Trespass against the Sheriff for wrong executing Possession	264
<i>Action on the Case</i> against the Sheriff for delivering more Acres than are in the Writ	<i>ibid.</i>
Where Possession of some in the Name of all, is good, or not.	<i>ibid.</i>
Riotous Possession delivered by the Under-Sheriff, how to be enquired of	265
For <i>Ouster</i> after Possession delivered, what Remedy	266
Where the Plaintiff shall have a new <i>Habere fac' Possession'</i>	<i>ibid.</i> & 267
Of the Return of <i>Habere fac' possession'</i> , and the Form	267, 268
Process: <i>Original Process</i> in real and personal Actions, and the Forms of the Returns	90, 91, &c.
Of <i>Mean Process</i>	94
Privilege from Arrests, <i>vide Arrests</i>	
Prisons, <i>vide Gaols</i>	

Q.

The Sheriffs Demeanour in a *Quare Impedit* 463

R. Re-

The TABLE.

R.

Recognizance, <i>vide Statute</i>	
<i>Recordare fac' loquelam</i>	Page 73, 75, 80, 81
Replevin: The several Sorts	70, 71, &c.
The Manner of Replevying	71
Respondeat Superior	<i>Vide</i> 38, 44, &c.
<i>Retorno Habendo</i>	70, 72, 76
Returns in Replevin	71, 72, 77, 80
——Property pleaded	74, 180
<i>Gager Deliverance</i>	75
Two Sorts of Pledges in Replevin	<i>ibid.</i>
The Form of a <i>Precept</i> in Replevin	78
The Form of the <i>Bond</i> for Security	79
<i>Rescous</i> : Where and in what Cases Action lies	
against the Sheriff for a <i>Rescous</i> , or not	302
Where the Sheriff makes himself chargeable by his	
Return of <i>Rescous</i>	305
<i>Action on the Case</i> lies against the Party that refused, and against the Sheriff	<i>ibid.</i> & 306
Remedy against the <i>Rescoufer</i> by Indictment, and	
how to be laid	307, 308
Of Returns of <i>Rescous</i> , what are good, or not	309
Rescue from the Bailiff of a Liberty, how to be	
returned	310, &c.
Of laying the Action and Declaration in <i>Resc.</i>	317
Difference between <i>Action on the Case</i> , and Returns	
and Indictments of <i>Rescous</i>	320, 321
Diversity between pleading <i>Rescous en Det</i> on E-	
scape, and <i>Action on the Case</i> in Escape	320
Pleading in <i>Rescous</i>	<i>ibid.</i>
<i>Venue</i> in <i>Rescous</i>	321
Where a Man may rescue himself, and where not	<i>ibid.</i>
New Execution upon a <i>Rescous</i>	320
Verdict on <i>Rescous</i> before the Day laid, or after,	
good, if before the Suit commenced	321, &c.
Rescue pleaded by the Bailiff of a Liberty	60, 61
	Re-

The TABLE.

Returns of Writs; when may be made	Page 144
General Rules of Returns	145
<i>Languidus in Prifona</i>	148
What muſt come in by way of Return, and not by way of Surmiſe	149
What Writs muſt be returned, and what need not	<i>ibid.</i>
What ſhall be a good Return or not, in reſpect of the Perſon returning	150
Of the new Sheriffs returning the Writ, executed in the Time of the old Sheriff	151
What Return ſhall be good in reſpect of the Form, or not	155
Return void for Uncertainty or Repugnancy	157
What ſhall excuſe the Sheriff for not returning Writs	159
What ſhall be a good Return againſt the Admit- tance of the Party	158
How Returns muſt be made if <i>Superſedeas</i> comes to the Sheriff	160
Returns from Inferior Courts	<i>ibid.</i>
Amendment of Sheriffs Returns	161
What Action, Proceſs or Appearance ſhall be good before the Return of the Writ	162
Penalty of the Sheriff by the Court for not re- turning	163
<i>Actions</i> brought for a False Return	164, &c.
Againſt the Bailiff of a Franchiſe, for a False Re- turn	168
The Sheriff's Duty, as to the Returns of Bailiff of Franchiſes	<i>ibid.</i>
The Sheriff's Submission to a Fine, no Conclusion to the Parties to bring a <i>False Return</i>	169
<i>Action on the Caſe</i> , and not <i>Debt</i> , for a False Re- turn	<i>ibid.</i>
Where the Action to be brought, and how to de- clare	170

Action

The TABLE.

Action against the old Sheriff for a <i>False Return</i>	Page 171
Action against the Sheriff, for not returning the Writ	174
If it may be against the Bailiff-Errant	175
The Sheriff not to file the Return, depending the <i>Action on the Case</i> against him	176
Of Laying the Action, and Declaration for not Returning	<i>ibid.</i>
Where a Man may traverse or aver against the Sheriff's Return, or not	177
A Return not amendable after it is filed	178
Of the Return of <i>Cepi Corpus & parat' habeo</i> when the Party is bailed, and the Reason of it	165, 166
<i>Vide</i> more of Return under their proper Titles, as <i>Scire facias</i> , &c.	
Respondeat Superior	<i>vide</i> 38, 44, &c.
Restitution: Of goods taken in Execution restored in <i>Specie</i>	250, &c.
Of Restitution of Lands or Goods seized by the Sheriff after Judgment reversed	254
And the Form of the Return in such Case	<i>ibid.</i>
On Sale of a Term, where the Term shall be restored, or not	254, 255

S.

<i>Scire facias</i> : For the Sheriff, upon a Return of a <i>Nihil</i> of the Pledges	104
<i>Scire fac'</i> , and Return against the Bail	110, 111
<i>Scire fac' de bonis propriis</i> , not to be awarded on Surmise of the Party, but on the Return of the Sheriff upon a <i>Devastavit</i>	216
<i>Scire fac'</i> to the Sheriff of London or Middlesex, on a Recognisance for Bail.	234
<i>Scire fac'</i> against the old Sheriff, to pay the Money levied in Execution	246
Of	

The TABLE.

Of Returns of <i>Scire fac'</i> , what are good or not	Page 295, 296, &c.
<i>Sheriffs</i> : In ancient Times how eligible, and how at this Day	5
His Power and Privilege	6
Favoured in the Execution of his Office	7, 8
His Office not apportionable	8
Not punishable for executing erroneous Process	9
Fine for Non-assistance of the Sheriff	10
His Power to break open Houses, <i>vide Execution</i>	11
His Letters Patents of Assistance	<i>ibid.</i>
In what Cases his Officers are excused from doing Wrong	<i>ibid.</i>
In what Cases he or they are punishable	13
<i>Vide Tit. Respondeat Superior.</i>	
In what Things his Power is restrained	12
Not to be chosen a Parliament-Man	<i>ibid.</i>
Not to serve above one Year	<i>ibid.</i>
The Sheriff's Power in another County	13
Of his Execution of Felons	14
What he must do at the Entrance into his Office	15
<i>Vide Oath</i>	18
The Cities and Towns of <i>England</i> which have <i>Sheriffs</i> , and how many	4
How the Sheriff's Office may be determined before his Year is out	31
In what Cases the High-Sheriff must execute the Office in Person	36
<i>Sheriff</i> not to dispute the Jurisdiction of the Court	261
Of the Sheriffs of <i>London</i> and <i>Middlesex</i> , <i>vide London</i>	
<i>Sheriff's</i> Office about the Sessions of the Peace	474
Seisin of Rent or Common, how to be delivered in Execution	264
<i>Supersedeas</i> : What amounts to a <i>Supersedeas</i>	269
Where a Writ of <i>Error</i> is a <i>Supersedeas</i> or not, and when	<i>ibid.</i>
Of	

The TABLE.

Of Execution by the Sheriff after a <i>Supersedeas</i>	267
Where a <i>Supersedeas</i> shall stay the Sale of Goods, or not	Page 271
<i>Statute-Merchant</i> , &c. The Writ of <i>Execution</i> on a <i>Statute-Merchant</i> , and a <i>Statute-Staple</i> , and the Difference	286, 288, &c.
The Manner of Execution on a <i>Statute-Merchant</i> , <i>Staple</i> or <i>Recognisance</i>	287, &c.
Difference between the Proceedings on a <i>Statute- Staple</i> and <i>Statute-Merchant</i>	289, &c.
Form of the Return on a <i>Recognisance</i> or <i>Statute</i>	290, 291, &c.

T.

Trespass against the Sheriff, for wrong executing Possession	264
Trespass and false Imprisonment, <i>vide Imprisonment</i> .	
Tourn of the Sheriff: Jurisdiction, &c.	82, 83
Inquisition taken in the Sheriff's Tourn	84
Pleadings as to the Tourn	85, &c.
Who shall be amerced for not coming to the She- riff's Tourn	84
Trials: By the Sheriff's Certificate, or by the Re- cord	48
Trial shall be where the Cause of Action ariseth	384, 388

V.

<i>Venditioni exponas</i> , (<i>vid. Fieri fac' & Supersed'</i>)	250
Sheriff's Demeanour in a Writ of <i>De Venire In- spiciend'</i>	448
Sheriff's Demeanour in a <i>Vi Laica removenda</i>	452
<i>Venire fac'</i> , and what Return thereof shall be good, or not	188

Amend-

The TABLE.

Amendment of <i>Venire</i>	Page 189
<i>Under-Sheriff</i> : His Nature, Antiquity, Office	32
What Bonds, Covenants, &c. are good between the <i>High-Sheriff</i> and <i>Under-Sheriff</i> , or not, and the Pleadings	40, 486
What Acts the <i>Under-Sheriff</i> , <i>Bailiff</i> , <i>Gaoler</i> , and the <i>High-Sheriff</i> are answerable for, and the Rule of <i>Respondent Superior</i>	38, 44, &c.

W.

<i>Withernam</i>	72, 76
<i>Warrant</i> : What Arrest shall be justified by Force of a Warrant	101
Where the <i>Bailiff</i> must shew his Warrant, and when	103
<i>Writ of Enquiry of Damages</i> : By whom to be executed, or not	213
The Time of executing it	<i>ibid.</i>
The Form of the Return	214
The <i>Sheriff's</i> Office in a <i>Writ of Enquiry of Waste</i>	453
The View; how the Enquiry to be made	<i>ibid.</i>
Of the Return, and of Damages in <i>Waste</i> , and Writ to levy them, to whom to be directed	454, 455, &c.
<i>Writ of Estrepment</i> ; where it lies, and the <i>Sheriff's</i> Office about it	458
<i>Writ of Partition</i> , his Duty therein	450

Ex J. H. A.

F I N I S.

